No. 89-1629-CFX
Status: GRANTED

Title: Salve Regina College, Petitioner
v.
Sharon L. Russell

Docketed:
April 16, 1990

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Snow,Steven E.

Counsel for respondent: Hogan,Edward T.

NOTE: See mail label re dock dt

Entry	Date	Note	Proceedings and Orders
1	Apr 16 1990	G	Petition for writ of certiorari filed.
3	Apr 23 1990		Waiver of right of respondent Sharon Russell to respond filed.
2	Apr 25 1990		DISTRIBUTED. May 10, 1990
4	May 9 1990	P	Response requested -- BRW, AMK. (Due June 8, 1990)
5	Jun 5 1990		Brief of respondent Sharon L. Russell in opposition filed.
6	Jun 12 1990		REDISTRIBUTED. June 27, 1990
7	Jun 28 1990		Petition GRANTED. limited to Question 1 presented by the petition.
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8	Aug 13 1990		Joint appendix filed.
9	Aug 13 1990		Brief of petitioner Salve Regina College filed.
10	Aug 22 1990		Record filed.
		*	Certified record received from USCA 1.
11	Sep 11 1990		Brief of respondent Sharon Russell filed.
12	Sep 12 1990	G	Motion of Ford Motor Company for leave to file a brief as amicus curiae filed.
13	Sep 19 1990		CIRCULATED.
14	Oct 1 1990		Motion of Ford Motor Company for leave to file a brief as amicus curiae GRANTED.
15	Oct 19 1990		SET FOR ARGUMENT TUESDAY, NOVEMBER 27, 1990. (3RD CASE)
16	Nov 27 1990		ARGUED.

89-1629

No. 90-

In The

Supreme Court of the United States

October Term, 1989

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship?

2. Whether a federal court violates the constitutionally mandated rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), when it disregards relevant holdings of the state's highest court and other available sources of state law and creates a novel rule of state law?

3. Whether a federal court should certify a question involving the complex relationship between a college and a student to the state's highest court, when the state's highest court has not yet had an opportunity to rule directly on the issue, prior to independently creating a novel rule of state law?

4. Whether a federal court can refuse to instruct a jury as to the binding effect of facts stipulated by the parties to be true, and whether the court thereafter may permit the jury to draw factual conclusions which are incompatible with the facts as stipulated?

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No. 90-

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 890 F.2d 484 and is reprinted in the Appendix hereto. The opinion of the district court denying petitioner's motion for a directed verdict is also reprinted in the Appendix. Finally, the opinion of the district court granting summary judgment in favor of the petitioner on five of the eight counts of respondent's complaint is reported at 649 F. Supp. 391 and is reprinted in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1989. A timely Motion for Rehearing with Suggestion for Rehearing *En Banc* was denied on January 16, 1990, and this Petition for Writ of Certiorari was timely filed. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Salve Regina College ("Salve Regina") is a catholic co-educational college of arts and sciences sponsored by the Sisters of Mercy. It is located in Newport, Rhode Island and maintains a department of nursing which awards graduates a bachelor of science in nursing degree.

2. Respondent, Sharon Russell, a citizen of Hartford, Connecticut, entered Salve Regina as a freshman in the fall of 1982. Toward the end of Russell's freshman year at Salve Regina, she sought admission to candidacy in the nursing department (161a - 171a; PE16).[1] She began her nursing studies as a sophomore in the fall of 1983.

3. On the first day of her sophomore year, Russell was advised of the nursing faculty's expectations of students (535a - 536a). At this time, Russell suffered from a serious addictive eating disorder resulting in her being extremely overweight. Russell was approximately 200

[1] References in the Statement are to the Joint Appendix, Plaintiff's Exhibits ("PE"), and Defendant's Exhibits ("DE") in the record on appeal.

pounds overweight – a medical condition known as morbid obesity (298a; 415a; 485a). Persons with morbid obesity are at significant medical risk because of their overweightness (479a).

4. On her first day as a nursing student, Russell's advisor had a private meeting with Russell at which time Russell's obesity was discussed. The advisor discussed some of the requirements of the program and the need for Russell to lose weight. The advisor told Russell she was concerned about Russell's obesity, both for Russell's personal health and its likely impact upon Russell's ability to perform as a professional nurse (305a; 538a).

5. The sophomore year nursing curriculum at Salve Regina consists primarily of academic courses – in contrast to clinical training which forms a major part of the junior and senior year nursing curriculum. Russell performed satisfactorily in her academic work. Nevertheless, Russell's obesity started to interfere with her nursing training and performance during the sophomore year. For example, Russell was unable to satisfactorily complete a course in cardiopulmonary resuscitation offered at Salve Regina (191a; 316a), after she fell on the training mannequin's head and required the instructor's assistance to raise herself (PE29; 1205a). Additionally, it was determined that Russell had significantly understated her weight on a health data form used for making clinical training assignments for her junior year. At that time, Russell promised the college's Clinical Agency Coordinator, the person in charge of assigning nursing students to clinical agencies, that she would try to lose weight before entering the clinical program (316a; 723a). Russell also signed a form in which she agreed, among other things,

to "accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not [Russell] can function in the clinical area" (196a - 197a; PE26).

6. Salve Regina's junior year nursing curriculum included a four credit nursing theory course and a four credit clinical training experience. Unfortunately, instead of losing weight as she had promised, Russell had gained weight before starting her clinical training (321a). As the year progressed, the senior of Russell's two clinical instructors came to believe that Russell's obesity was interfering with her nursing practice and training (471a). Initially, Russell could not fit into the scrub gowns provided by the hospital in which she was training (322a), thus precluding Russell from obtaining experience in the operating room (583a). In her instructor's judgment, Russell had difficulty internalizing and integrating concepts regarding nutrition and obesity and applying these concepts to her assigned patients (573a; 584a).

7. At the end of the fall semester of Russell's junior year, Russell was given a final clinical evaluation by the senior instructor (PE37). In that evaluation, Russell received six unsatisfactory grades and was told that, in the instructor's view, Russell's professional performance was unsatisfactory (231a; 594a-595a). The deficiencies noted by the instructor were all, in some respect, related to Russell's morbid obesity.

8. Salve Regina's Department of Nursing had in effect a policy that even a single unsatisfactory grade in the clinical setting would result in a failing grade in that course, leading to dismissal from the nursing program

(651a). In this case, however, the faculty was ambivalent about summarily dismissing Russell because all of Russell's deficiencies were related to her obesity (593a; 652a). Russell's clinical instructor discussed the grade and available options with the department chairperson and indicated that she was willing to give Russell a passing grade if Russell would commit to losing weight.[2]

9. On December 18, 1984, a meeting took place between Russell, the clinical instructor and the department chairperson wherein an agreement was reached under which Russell would be given a passing grade in the clinical course she had completed – thus avoiding expulsion from the nursing program – conditioned upon Russell entering a treatment program (Weight Watchers), achieving a weight loss of 2 pounds per week, and reporting her progress to the Clinical Agency Coordinator on a weekly basis (232a; 625a). A written contract was prepared which established the conditions for Russell's continuation in the nursing program. The agreement provided, in part:

> I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the nursing program at Salve Regina College thus making me ineligible for Nursing 411.[3]

(PE38, 1237a).

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[2] Russell consistently maintained that her obesity had no physiological basis and was within her power to change (362a). She also insisted that her obesity was not a handicap (362a). In the view of the clinical instructor, Russell's weight loss would likely improve the behaviors which concerned her (627a).

[3] The course referred to in the contract, Nursing 411, is the clinical training component required to be taken during the

(Continued on following page)

10. Russell executed the written contract (233a; 350a). Russell understood that if she could lose two pounds per week consistently, and otherwise meet the academic requirements, she would be allowed to continue in the program (341a). Russell also understood that she had committed herself to withdraw voluntarily from the nursing program if she did not meet the contractual commitment (708a).

11. As a result of entering into the contract, Russell was allowed to continue in the nursing program on a probationary status (674a; 729a). Upon entering into the contract, Russell began a weight treatment program, reported as required, and experienced a fluctuating weight loss which did not average two pounds per week (240a). After May, 1985, Russell failed to report regularly as she had agreed and, unfortunately, began once again to gain weight. In July, 1985, Russell was advised that the department was disappointed in her progress and that Russell had not fulfilled the terms of the contract (260a - 261a). Russell was told that she probably would not be permitted to enroll in Nursing 411 (761a).

12. Russell's net weight loss over the six month period after entering the contract was 10 pounds. Russell also had failed to report weekly to the Clinical Agency

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(Continued from previous page)

senior year and is a prerequisite for graduating from Salve Regina with a degree in nursing. Russell's eligibility for the theory portion of the senior year curriculum, Nursing 410, was not affected by the contract (658a).

Coordinator as she had promised. As a result, Russell was advised on August 21, 1985 that she had not complied with the conditions for entering Nursing 411 and that her name was being removed from the list of students eligible to enroll for that course (372a - 373a).

13. Notwithstanding the department's action, Russell was still enrolled as a student at Salve Regina and could have qualified to graduate although Russell could not have graduated as a nurse within the normal four year time frame (795a; 764a). To have graduated from Salve Regina as a nurse, Russell would have had to establish her eligibility for entering Nursing 411, successfully complete Nursing 411, and complete the other requirements for the degree (795a).

14. Instead of filing a grievance, seeking reinstatement to the nursing department, or changing majors (661a), Russell transferred to St. Joseph's College in Connecticut (267a). Russell had to repeat her junior year at St. Joseph's College (268a) due to that institution's requirement that students earn at least 60 credits in residence before graduating with a nursing degree (437a). One year after undergoing radical surgery which reduced her overweightness by 50%, Russell successfully completed her bachelor's degree in nursing at St. Joseph's (156a).

15. This litigation was commenced by Russell in September, 1985 against Salve Regina and five individually named faculty members. The complaint alleged handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the denial of due process and unconstitutional interference with Russell's liberty and property interests, negligent and intentional infliction of

emotional distress, invasion of privacy, wrongful dismissal, violation of implied covenants of good faith and fair dealing, and breach of contract (4a - 16a).

16. On November 17, 1986, the district court entered summary judgment in favor of defendants with respect to all of the claims save those involving intentional infliction of emotional distress, invasion of privacy, and breach of contract. 649 F. Supp. 391. Since all the claims based upon federal law were dismissed, federal jurisdiction over the remaining claims was premised solely upon diversity of citizenship, 28 U.S.C. § 1332(a)(1).

17. Pursuant to the district court's pre-trial order, the parties filed a joint statement which included 40 separate stipulations of fact agreed to by the parties (73a - 85a).

18. At the close of respondent's case-in-chief, the district court directed a verdict in favor of all the individual defendants on all of the claims against them, and directed a verdict in favor of Salve Regina on the claims of intentional infliction of emotional distress and invasion of privacy (517a - 524a). The district court ruled, however, that there was a triable issue with respect to breach of contract. Although the district court rejected Russell's claims that the weight loss contract was procured by duress and lacked consideration, and held that the special agreement which established the conditions for Russell's eligibility in the nursing program was part of the overall relationship between Russell and Salve Regina (522a - 523a), the district court nevertheless stated:

> The basic question is whether Salve Regina College was justified in dismissing this plaintiff after completion of three years, and not allowing her to enter her fourth year, and final year, of the nursing program, toward a degree (521a).

The district court continued:

> In short, I think there is a legitimate question for the jury to decide as to whether the dismissal of the plaintiff in August of 1985 by Mrs. Chapdelaine, was reasonable and justified in view of the whole contractual relationship between the college and this plaintiff. In other words, it creates an issue of substantial performance. . . . If the jury can say that the plaintiff substantially performed her contractual obligations to the college, then they can say she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under the side agreement, then the jury can determine that the college justifiably dismissed her from the program (523a).

19. At the close of all of the evidence, Salve Regina renewed its motion for a directed verdict on the grounds, *inter alia*, that the plaintiff had admitted – as evidenced by the stipulated facts – that she had not met – nor came close to meeting – the conditions established for her continuance in the nursing program and that, as a result, Salve Regina College was entitled to judgment as a matter of law. The college also urged that the "substantial performance" test was not applicable under Rhode Island law, or the law of any other state, in the unique context of the college-student relationship (814a - 817a). The district judge, while acknowledging that the Rhode Island Supreme Court had to date limited the application of the "substantial performance" test to construction contracts,

and while agreeing that the doctrine of substantial performance should not apply generally in the academic context, nonetheless ruled that he believed that the Rhode Island Supreme Court would apply the doctrine in this case. No analysis or legal rationale for this prediction was given (820a - 822a). The court denied the motion for a directed verdict and sent the case to the jury (820a - 822a). The college seasonably objected to the charge (904a - 905a).

20. The jury returned a verdict finding the college liable in damages for breach of contract (915a). The district court denied the college's post-trial motions for judgment notwithstanding the verdict, for a new trial, and/or remittitur (132a), after which the clerk entered judgment.

21. The court of appeals affirmed without engaging in any meaningful review of the case. Acknowledging that Rhode Island law applied to all substantive aspects of the case, the court of appeals characterized the case as one of "first impression" and noted that the district court believed that the Rhode Island Supreme Court would apply the substantial performance standard to the contractual relationship between a student and a college. Based upon the First Circuit's rule of deferring to interpretations of state law made by federal judges sitting in that state, the court of appeals held that the district court's determination was not "reversible error.". 890 F.2d at 489. The court of appeals also rejected petitioner's other grounds for appeal, considering it "appropriate to accord the district court reasonable leeway." 890 F.2d at 490.

SUMMARY

This case presents an opportunity for this Court to determine a number of important and potentially far-reaching issues – including fundamental questions of the allocation of power between the federal and state judiciaries which have not been addressed by this Court in some time. The district court below deemed itself free to declare and apply its own opinion of how the Rhode Island Supreme Court would view the complex relationship between a student and a college. Through the simple expedient of characterizing the case as one of first impression, the district court created a novel and highly troubling rule of state law while ignoring relevant decisions of the Rhode Island Supreme Court, clear legal precedent from other states following a similar doctrinal approach as the Rhode Island Supreme Court, and the reasoned views of legal commentators. Although the district court dressed up its decision as a prediction of what the Rhode Island Supreme Court would likely hold if the case were before it, no rationale nor legal analysis accompanied the prediction. Except for the district judge's subjective feelings and belief, his creation of new law for Rhode Island was totally without foundation. The district court felt that the lack of a precise precedent gave it leeway to create a new rule in the guise of a prediction.

Since this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the Constitution mandates the application of state rather than federal decisional law in diversity cases. In instances where the state's highest court has made a recent ruling in an "all-fours" factual situation, the federal courts have had little

difficulty in applying the *Erie* rule. A problem of ascertaining state law arises however, when the state's highest court has not spoken, either recently or at all, on the question in issue. A more serious problem arises, however, when a federal judge wishes to make an independent decision and reads recent, analogous cases narrowly in order to arrive at the conclusion that the highest court has not spoken authoritatively on the question presented. The question then becomes whether the federal judge may make an independent decision on the basis of what he deems to be the right rule, or whether he must analyze other sources of state law in order to ascertain what the law of the state would be if the issue were before the state's highest court.

This Court has yet to express a definite opinion as to the process which binds a federal judge in ascertaining state law when the highest state court has not spoken to the precise question in issue. This is an important issue which goes to the heart of our federal system of government and one which should be settled by this Court.

A second important issue raised by this petition which has never been directly answered by this Court is the problem of which court within the federal judicial system is charged with the ultimate responsibility for ascertaining what state law is. While the ultimate power to decide whether state law was properly applied in a diversity case undoubtedly rests with the Supreme Court, this Court has indicated its reliance on lower federal courts for the interpretation of state law.

But which of the lower courts? In the First Circuit, it is the district court's construction of state law that now applies. In this case, for example, the court of appeals refused to review the district judge's prediction of state law, deferring to the district court's presumed expertise in the law of the state of Rhode Island. Thus, despite Salve Regina's statutory if not constitutional right to at least one appeal, that right became largely meaningless because the district court's interpretation of state law – even if incorrect – was not viewed as reversible error. Other circuits, most notably the Third, Sixth, Seventh, Ninth, and Tenth Circuits, take a wholly different approach. In those circuits, rather than the deferential standard of review to a district judge's construction of the law of the state, which accepts that construction unless it is clearly wrong, questions of state law are reviewed by the court of appeals under the same independent *de novo* standard as are questions of federal law. Those circuits properly recognize that anything less than a full independent *de novo* review is an abdication of appellate responsibility and a deprivation of a party's right to a full, considered and impartial review of the district court's decision. This Court should resolve this conflict in the circuits, and clearly establish that the courts of appeal have the responsibility for ascertaining state law and that a *de novo* standard for reviewing district courts' pronouncements of state law is mandated.

Another important issue raised by this petition is the desirability of a federal court's refraining from the exercise of jurisdiction in those diversity cases where it finds itself unable to ascertain accurately the law of the state involved. Although this Court ruled in *Meredith v. Winter*

Haven, 320 U.S. 328 (1943), that federal courts should accept the responsibility to decide questions of state law when necessary for the disposition of cases brought to it for decision, subsequent experience with federal district judges exercising a quasi-legislative function in the development of state law raises the question of whether principles of federalism require reconsideration of the question of abstention, or at least mandatory certification to the state's highest court for guidance, whenever state law is unclear.

Finally, this case raises an important question of federal procedure. For reasons known only to the district court, the district judge refused petitioner's request to read the stipulated facts to the jury and to instruct the jury that they must treat the stipulated facts as having been proved and accept them as true (113a - 114a). The law appears to be clear that stipulations or admissions made pursuant to a pre-trial order are the equivalent of proof and prevent an independent examination by the jury with respect to the matters stipulated. Had the jury been required to accept the stipulated facts as conclusive, it could not have concluded, as it apparently did, that respondent substantially performed her obligations to the college. Although this issue was fully briefed and argued to the Court of Appeals, it was never decided. The case should be remanded to the Court of Appeals for decision on this issue.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER A PARTY IS ENTITLED TO A DE NOVO REVIEW OF A DISTRICT COURT'S DETERMINATION OF STATE LAW.

The court of appeals did not engage in any meaningful review of the district court's prediction that the Rhode Island Supreme Court would rule that a student's substantial – although not full – performance in meeting the requirements for continuing or completing an academic program is sufficient.[4] The First Circuit failed to review the decision because it applies a deferential standard of review to a district judge's construction of the law of the state in which he or she sits, accepting that construction unless it is "clearly wrong." *Dennis v. Rhode Island Hospital Trust National Bank*, 744 F.2d 893, 896 (1st Cir. 1984); *Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982).[5] Thus, the First Circuit equates a district court's determination of state law with determinations of

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[4] Despite exhaustive research, the college has found no other case in the academic or educational context in which the commercial contract doctrine of "substantial performance" has been applied. To the contrary, the only courts that appear to have considered the application of such a doctrine have rejected it. *Slaughter v. Brigham Young University*, 514 F.2d 622, 627 (10th Cir. 1975); *Clayton v. Trustees of Princeton University*, 608 F. Supp. 413 (D.N.J. 1985).

[5] Other circuits have similarly applied this limited standard of review. *See, e.g., Mitchell v. Random House, Inc.*, 865 F.2d 664 (5th Cir. 1989); *Harris v. Pacific Floor Machine Manufacturing Co.*, 856 F.2d 64 (8th Cir. 1988).

fact under Rule 52(a) of the Federal Rules of Civil Procedure. The "clearly erroneous" standard of Rule 52, however, is based upon the trial judge's unique opportunity to judge the accuracy of witnesses' recollections and make credibility determinations – factors that are not relevant to a conclusion of law – be it federal or state.

In contrast, the Court of Appeals of the Third, Sixth, Seventh, Ninth and Tenth Circuits take a wholly different approach. In the leading case of *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984), an *en banc* United States Court of Appeals for the Ninth Circuit concluded that district court determinations of state law pursuant to the *Erie* doctrine are subject to *de novo* review in the same manner as any other question of law. In that case, the Ninth Circuit held that anything less than full independent *de novo* review of state law determinations by district courts amount to an abdication of appellate responsibility. Observing that every party is entitled to a "full, considered, and impartial review of the decision of the district court," the court ruled that there is no justification for being less thorough, or for curtailing the parties' appellate rights, simply because the law involved is state law. 739 F.2d at 1398. According to the Ninth Circuit, there is no sound reason to have a lesser appellate duty to make a correct independent determination when the question is one of state law. 739 F.2d at 1398.

The Ninth Circuit's rule of *de novo* review has now been followed in a number of other jurisdictions. *See, e.g., Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914, 929 (6th Cir. 1988) (it would be an abdication of appellate responsibility to give less than *de novo* review); *Craig v. Lake Asbestos of Quebec. Ltd.*, 843 F.2d 145, 148 (3rd Cir. 1988) (district court's determinations of state law subject to plenary review); *Beard v. J.I. Case Co.,*. 823 F.2d 1095, 1098 (7th Cir. 1987); *Afram Export Corporation v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1370 (7th Cir. 1985).

The question of the standard of review to be given to state law determinations by federal courts is an issue that ought to be decided by this Court. Our jurisprudence has developed a thesis that a person is entitled as a right to one appeal; this thesis is at least statutory if not constitutional in origin. *Cf.* 28 U.S.C. § 1291; *Griffin v. Illinois*, 351 U.S. 12 (1956). Since this Court's energies must be husbanded for resolution of issues of greater public importance than determinations of state law questions, it is obvious that the only chance for appellate review will be to a court of appeals. When a court of appeals exercises its mandatory appellate jurisdiction by giving full and independent review to the decision of the district court, this Court then becomes free to conserve its discretionary powers because the parties have already been accorded full appellate review.

Moreover, it would appear that the policies which are basic to the decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), mandate full appellate review by the court of appeals. In *Erie*, this Court ruled that equal justice required, to the extent possible, application of the same law to all persons regardless of their citizenship, and neutralization of the advantage of forum shopping. 304 U.S. at 74-78. The petitioner before the Court did not choose the federal forum; it was brought to the federal forum merely by accident of respondent's domicile. Had the case been tried before a Rhode Island trial court, the parties would have been accorded full appellate review by the Rhode

Island Supreme Court – the state's highest judicial authority. In contrast, the federal district court in this case acted as a substitute for the entire state court system. The petitioner was not only foreclosed from a definitive ruling on state law; it was foreclosed from any meaningful judicial review of the district court's speculation as to state law.

The First Circuit's deference to the district court is based solely upon the latter's purported expert knowledge of the law of the state in which it is located. While it is true that a district judge may be an expert in determining and applying state law, a district judge is no less an expert in determining and applying federal law. There is simply no sound reason for according greater weight to the former than to the latter and for maintaining different standards of appellate review. Given that appellate judges are not encumbered, as are trial judges, by the process of hearing evidence, they are more free to concentrate on legal questions – federal and state. If anything, the collaborative, deliberative process of appellate courts probably puts them in a better position than the district courts to decide questions of law.

II. IMPORTANT ISSUES OF FEDERALISM REQUIRE THAT THIS COURT ARTICULATE AND DEFINE THE STANDARDS TO BE USED IN ASCERTAINING STATE LAW.

This Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), taught that the federal courts exercising diversity of citizenship jurisdiction must apply state rather than federal decisional law. In so doing, the decision raised the question of how a federal judge is to ascertain

and apply state decisional law. As Mr. Justice Frankfurter noted in *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198 (1956), the *Erie* rule makes a choice between two evils:

> One of the difficulties, of course, resulting from *Erie R.R. Co. v. Tompkins*, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state policies going to the heart of those rights.

350 U.S. at 208-09.

The *Erie* opinion itself shed little light on the problem of ascertaining unclear state law; nevertheless, in analyzing the proper role of the federal judge with respect to state law, *Erie* provides the policies and ground rules from which standards of judicial conduct must be devised. In those few instances where a state's highest court has made a ruling directly on point, there is little difficulty in applying the *Erie* rule. There is no doubt that a federal judge is bound by the decision of an intermediate state court of state-wide jurisdiction, absent a ruling by the highest court of the state or other convincing evidence of state law. *Fidelity Union Trust Company v. Field*, 311 U.S. 169 (1940). Moreover, it is clear that a federal judge must ascertain and apply state law regardless of his or her personal belief as to its correctness. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940). Finally, it is clear that state law arises from many sources, and a federal judge must be cognizant of all such sources in

making his or her determination. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1956).

What is not clear, however, are the standards for analysis that a judge must utilize to ascertain state law when an authoritative state court has not spoken to the precise question in issue – and what restrictions constrain a federal judge who wishes to create new state law and thus reads closely analogous cases narrowly in order to arrive at the conclusion that the matter is one of first impression. These issues are presented in the instant petition.

In this case, the district judge ruled that he was satisfied in his "own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case" (821a).[6] This conclusion was not based upon recognized sources

[6] The doctrine of substantial performance is inherently unworkable in the academic context. Imagine, for example, a student who successfully completes 124 out of 128 credits required for graduation. Should a jury be permitted to conclude that the student "substantially performed" the requirements and, thus, is entitled to a degree? Would anyone wish to be treated by a nurse who "substantially performed," but did not fully meet the requirements for graduation? Professional education requires subjective evaluation in non-cognitive areas like clinical performance, and the law must respect a faculties' professional judgment as to the level of performance. *Cf. Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

of state law such as published opinions, relevant statutes, legislative history, treatises, law review articles, or other sources of law which would be examined by the state's highest court. Rather, the determination was based upon some undefined special knowledge or feeling for Rhode Island law that the district judge presumed to have but could not articulate.

Since the very act of a federal judge in deciding a case serves a declaratory function of restating, adding to, or modifying the pre-existing "body of law" of the state, there should be some well-defined standard by which a federal judge acts to predict the way in which the state's highest court would rule. The accuracy of prediction of state court decisions by a federal judge depends upon the judge's ability to emulate the judicial decision-making process of the state court. This, in turn, requires an examination of all sources of state law and methodologies of decision making, in order to isolate those factors peculiar to the particular state's judicial process which materially affect the outcome of litigation within a state. Moreover, the examination must include all available persuasive data including compelling inferences or logical implications from other related adjudications. Anything less would be inconsistent with *Erie* and the principles of federalism upon which *Erie* is based.

The danger inherent in the current lack of standards – the nearly unbridled power of a district court to create state law – is clearly manifested in this case. Even a cursory analysis would demonstrate that the Rhode Island Supreme Court has long limited the application of the doctrine of "substantial performance" to construction contract cases, where it typically arises when a builder

claims from the owner payment of the unpaid balance due under the contract. In such situations, it is well settled in Rhode Island that when a builder has substantially performed, he can recover the contract price less the amount needed by the owner to remedy the defect. *National Chain Co. v. Campbell*, 487 A.2d 132, 135 (R.I. 1985); *Ferris v. Mann*, 99 R.I. 630, 636, 210 A.2d 121, 124 (1965). The doctrine of substantial performance recognizes that it would be unreasonable to condition a builder's recovery upon strict performance where minor defects or omissions could be remedied by repair. *Id.*

It seems highly unlikely, however, that the Rhode Island Supreme Court would apply the doctrine of substantial performance to a dispute arising out of the relationship between a private college and a student. Rhode Island recognizes that the student-college relationship is unique and cannot be stuffed into one doctrinal category such as contract or associational law. While it is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between a student and a college to provide some framework into which to put the problem, it is clear that commercial contract doctrine is not applied in all its aspects. *See, e.g., Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied* 435 U.S. 971 (1978) (applying Rhode Island law).[7] In Rhode Island, the standard applied to the

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[7] The *Lyons* case is based upon the leading case from the Court of Appeals for the Tenth Circuit, *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), *cert. denied* 423 U.S. 898 (1975). This interpretation of the student-university relationship has been adopted virtually universally since 1975.

(Continued on following page)

student-college relationship is that of reasonable expectation – what meaning the party making a manifestation should reasonably expect the other party to give it. *Id.* at 202.

Despite this clear authority, the district court chose to reject the college's proffered jury instructions which outlined the "reasonable expectations" standard and instead espoused the prediction that the Rhode Island Supreme Court would apply the commercial contract doctrine of "substantial performance." The district court made this prediction notwithstanding the fact that every reported case in the academic or educational context which has considered the application of the doctrine of substantial performance has rejected it.[8]

The erroneous prediction of state law by the district court in this case – compounded by the court of appeals' deference to the district court on issues of state law – underscores the need for this Court to clarify and restrict a federal court's ability to create state law out of whole cloth. Despite efforts to restrict diversity jurisdiction, diversity cases still comprise a substantial portion of the

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These cases adhere to the principle of avoiding mechanistic applications of contract law and afford institutional academic decision making the utmost latitude and discretion. *See, e.g., Neel v. Indiana University Board of Trustees*, 435 N.E.2d 607 (Ind. Ct. App. 1982); *Sofair v. State University of New York – Upstate Medical Center College of Medicine*, 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), *reversed on other grounds*, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 (1978); *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980).

[8] See note 4, *supra*.

docket of the district courts. In small states such as Rhode Island, where there is only a single state appellate court, it is rare to find an authoritative state decision directly on point. As a result, in Rhode Island at least, the federal district court, as a practical matter, creates as much decisional state law as the state judiciary. At present, simply by characterizing the case as one of first impression, the federal court has virtual *carte blanche* to act as a quasi state legislature in creating new law. This state of affairs simply cannot be countenanced under the *Erie* doctrine's declaration that the federal courts lack constitutional authority to create substantive law to be applied within the states. This Court should issue its Writ of Certiorari to establish the standards to be adhered to by district courts in ascertaining state law.

III. THE FEDERAL COURT SHOULD HAVE CERTIFIED THE QUESTION TO THE RHODE ISLAND SUPREME COURT.

Until such time as Congress sees fit to abolish diversity jurisdiction, this Court should consider the desirability of the lower federal courts abstaining from the exercise of jurisdiction in those cases, such as the case at bar, where the district court believes the matter is one of first impression in the state. This simple expedient would eliminate the federal courts' unwarranted intrusion into the development of state law.

Although this Court ruled in *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943), that parties were entitled to have an adjudication of questions of state law in diversity cases, such a rule is not constitutionally or statutorally mandated. This is evidenced by the refusal of the

federal courts to resolve issues of domestic relations and probate matters despite the meeting of jurisdictional requirements. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Petitioner suggests that the Court ought to reconsider its ruling in *Meredith* in the interests of federalism and judicial workload.[9]

Another possibility which would preserve the notions of federalism upon which the *Erie* doctrine is based would be to require federal courts to certify doubtful questions of state law to the state high court for resolution.[10] Through the adoption of this practice, the court best equipped to answer state law questions could do so in a definitive manner, and the equality of treatment which the *Erie* rule was aimed to accomplish would be assured.

This Court should issue its Writ of Certiorari to evaluate these alternatives.

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[9] Justices Black and Jackson dissented from the Court's ruling in *Meredith*. Moreover, Mr. Justice Frankfurter, who joined in Mr. Chief Justice Stone's opinion in that case, later indicated doubts about the result. See Frankfurter, J. in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 53 (1954).

[10] For example, Rule 6 of the Rules of the Supreme Court of the State of Rhode Island authorizes that tribunal to answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court if there are involved in any proceeding before it questions of Rhode Island law which may be determinative of the cause then pending in the certifying court, and as to which it appears to the certifying court there is no controlling precedent.

IV. THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS TO DETERMINE WHETHER THE FEDERAL DISTRICT COURT CAN REFUSE TO INSTRUCT A JURY AS TO THE BINDING EFFECT OF STIPULATED FACTS.

Pursuant to the district court's pre-trial order, the parties agreed to 40 separate stipulations of fact (73a - 85a). Salve Regina requested an instruction to the jury that the jury must treat the stipulated facts as having been proved and accept them as true (113a - 114a). The district court failed to give the requested charge over the college's objection (904a).

While not ruled upon by this Court, the law seems clear that stipulations or admissions made pursuant to a pre-trial order are the equivalent of proof and prevent an independent examination by the jury with respect to the matters stipulated. *See, e.g., Burstein v. United States*, 232 F.2d 19, 22-23 (8th Cir. 1956); *Jackson v. United States*, 330 F.2d 679 (8th Cir. 1964), *cert. denied* 379 U.S. 885 (1964); *United States v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965).

It is unclear why the district court refused to instruct the jury that they were bound by the stipulated facts; it proffered no rationale for the action. What is clear, however, is that Salve Regina was prejudiced by the jury's failure to consider the stipulated facts as binding. Had the jury been required to accept the stipulated facts as conclusive, it would have been impossible for the jury to have concluded, as it apparently did, that respondent substantially performed her obligations to the college.

While this issue was fully briefed and argued to the court of appeals, the court of appeals rendered no

decision on this issue. This Court should exercise its supervisory powers and remand this issue to the court of appeals for decision.

CONCLUSION

For the reasons stated, the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

Sharon L. RUSSELL,
Plaintiff, Appellee,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellants.

Sharon L. RUSSELL,
Plaintiff, Appellant,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellees.

Nos. 89-1564, 89-1597.

United States Court of Appeals,
First Circuit.

Heard Oct. 3, 1989.

Decided Nov. 20, 1989.

Steven E. Snow, with whom Partridge, Snow & Hahn, Providence, R.I., was on brief for Salve Regina College, et als.

Edward T. Hogan, with whom Hogan & Hogan, East Providence, R.I., was on brief for Sharon L. Russell.

Before BOWNES and TORRUELLA, Circuit Judges, and TIMBERS,* Senior Circuit Judge.

TIMBERS, Circuit Judge:

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*Of the Second Circuit, sitting by designation.

This consolidated appeal arises from the stormy relationship between Sharon L. Russell ("Russell") and Salve Regina College of Newport, Rhode Island ("Salve Regina" or "the College"), which Russell attended from 1982 to 1985. The United States District Court for the District of Rhode Island, Ronald R. Lagueux, *District Judge*, entered a directed verdict for Salve Regina on Russell's claims of invasion of privacy and intentional infliction of emotional distress at the close of plaintiff's case-in-chief, but allowed Russell's breach of contract claim to go to the jury.[1] The jury found that Salve Regina had breached its contract with Russell by expelling her. The court entered judgment on the verdict, denying Salve Regina's motions for judgment n.o.v. and for a new trial. The court also denied Salve Regina's motion for remittitur of the damages of $30,513.40 plus interest, a total of $43,903.45, that the jury awarded Russell.

On appeal Russell contends that, because a reasonable jury could have found invasion of privacy and intentional infliction of emotion distress under Rhode Island law, the district court erred in entering a directed verdict

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[1] This action originally was assigned to then-District Judge Bruce M. Selya. Judge Selya granted summary judgment in favor of the individual defendants on all counts and in favor of Salve Regina on five counts of Russell's complaint: due process, handicapped discrimination, negligent infliction of emotional distress, wrongful discharge and breach of convent of good faith. Russell does not raise the granting of summary judgment as to any of these counts on appeal. Judge Selya denied summary judgment on the three claims that are the subject of this appeal. *Russell v. Salve Regina College*, 649 F.Supp. 391 (D.R.I.1986).

on those claims. Salve Regina contends that the judgment that it breached its contract with Russell should be reversed because: (1) the court erred as a matter of law in its analysis of the contract between a student and the college she attended; and (2) even accepting the court's formulation, there was insufficient evidence to support the jury verdict. It also argues that the calculation of damages was incorrect as a matter of law.

For the reasons set forth below, we affirm the judgment of the district court in all respects.

I.

We summarize only facts believed necessary to an understanding of the issues raised on appeal.

By all accounts, Sharon Russell was an extremely overweight young woman. In her application for admission to Salve Regina, Russell stated her weight as 280 pounds. The College apparently did not consider her condition a problem at that time, as it accepted her under an early admissions plan. From the start, Russell made it clear that her goal was admission to the College's Nursing Department.

Russell completed her freshman year without significant incident and was accepted in the College's Nursing Department starting in her sophomore year, 1983-1984. Her trauma started then.[2] The year began on a sour note

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[2] The facts recited here, which relate primarily to the distress and privacy claims that were the subject of the

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when a school administrator told Russell in public that they would have trouble finding a nurse's uniform to fit her. Later, during a class on how to make beds occupied by patients, the instructor had Russell serve as the patient, reasoning aloud that if the students could make a bed occupied by Russell, who weighed over 300 pounds, they would have no problem with real patients. The same instructor used Russell in similar fashion for demonstrations on injections and the taking of blood pressure.

The start of Russell's junior year, 1984-85, coincides with the time school officials began to pressure her directly to lose weight. In the first semester, they tried to get Russell to sign a "contract" stating that she would attend Weight Watchers and to prove it by submitting an attendance record. Russell offered to try to attend weekly, but refused to sign a written promise. Apparently, she did go to Weight Watchers regularly, but did not lose significant weight. One of Russell's clinical instructors gave her a failing grade in the first semester for reasons which, the jury found, were related to her weight rather than her performance.[3]

According to the rules of the Nursing Department, failure in a clinical course generally entailed expulsion from the program. But school officials offered Russell a

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directed verdict, must be viewed in the light most favorable to Russell. *Bennett v. Public Service Co.*, 542 F.2d 92 (1st Cir.1976).

[3] Significantly, Russell's other clinical instructor that semester considered her performance outstanding. In addition, Russell's academic record indicates at least satisfactory performance in all courses except the clinical one that she failed.

deal, whereby she would sign a "contract" similar to the one she rejected earlier, with the additional provision that she needed to lose at least two pounds per week to remain in good standing. The "contract" provided that the penalty for failure would be immediate withdrawal from the program. Confronting the choice of signing the agreement or being expelled, Russell signed.

Russell apparently lived up to the terms of the "contract" during the second semester by attending Weight Watchers weekly and submitting proof of attendance, but she failed to lose two pounds per week steadily. She was nevertheless allowed to complete her junior year. During the following summer, however, Russell did not maintain satisfactory contact with College officials regarding her efforts, nor did she lose any additional weight. She was asked to withdrawal from the nursing program voluntarily and she did so. She transferred to a program at another school.[4] Since that program had a two year residency requirement, Russell had to repeat her junior year, causing her nursing education to run five years rather than the usual four. Russell completed her education successfully in 1987 and is now a registered nurse.

Soon after her departure from Salve Regina, she commenced the instant action which led to this appeal.

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[4] Although the record is unclear, it appears that the College told Russell that she would not be eligible to register for her senior year, but could apply for a change of status if she met the College's conditions. Russell instead chose to transfer. At any rate Salve Regina does not dispute that Russell's departure was not truly "voluntary".

II.

Subject matter jurisdiction over this case is based on diversity of citizenship. 28 U.S.C. § 1332 (1988). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (1988). The parties do not dispute that the law of Rhode Island applies to all substantive aspect of the case.

We discuss first in section II of this opinion that two claims with respect to which the district court directed a verdict in favor of the College. Then in section III we discuss the contract claim which was submitted to the jury.

(A) *Intentional Infliction of Emotional Distress*

Rhode Island recognizes this tort theory. It has adopted as its standard § 46 of the Restatement (Second) of Torts (1965). *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I.1984). Section 46 states that:

> "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Restatement (Second) of Torts § 46.[5] Rhode Island has added the requirement of at least some physical manifestation. *Curtis v. State Dep't for Children*, 522 A.2d 203 (R.I.1987). Russell has alleged nausea, vomiting,

[5] Russell does not allege that the administration of Salve Regina intended to harm her, but rather that they hounded her without regard to the consequences.

headaches, etc., resulting from the College's conduct. This appears to create a triable issue on the causation and harm elements of the theory. The issue on appeal, therefore, is whether the conduct alleged is sufficiently extreme and outrageous.

In its arguments that the conduct of its employees does not rise to the necessary threshold, the College in essence concedes a pattern of harassment, but argues that the conduct was merely discourteous and necessary to carry out its academic mission.[6] We have no doubt that the conduct was insensitive, but to be tortious it must be "atrocious, and utterly intolerable in a civilized community." *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1021 (1st Cir.) (construing Rhode Island law and quoting Restatement, *supra*, § 46, comment d), *cert. denied*, 109 S.Ct. 65 (1988). Without regard to context, the College is correct; a series of insults, even if ongoing and systematic, is insufficient. But the context – the relationship of the plaintiff to the defendant and the knowledge of plaintiff's special sensitivities – is a necessary element of the tort. Prosser

[6] Regarding the latter point, the College correctly states that both the Restatement and Rhode Island law may excuse otherwise tortious conduct if taken to protect legitimate interests. *Champlin supra*, 478 A.2d at 988; Restatement, *supra*, § 46, comment g. The example provided is that of a heartless landlord exercising his privilege to evict a destitute family for nonpayment of rent. *Id.*, comment g, illustration 14. It is unable, however, to specify the interest served beyond "educational standards". We are unable to see what interest would be served by the petty, mean-spirited and concerted conduct in question. If anything, the interest of a college faculty and administrators should be the creation of an atmosphere of courtesy and tolerance.

and Keeton, The Law of Torts, § 12, at 64 (5th ed. 1984). The school officials knew very quickly that Russell wanted badly to become a nurse and that she was easily traumatized by comments about her weight; yet they harassed her continuously for almost two years.[7] In this context, comments by school officials about weight were doubly hurtful.

Even considering the context and acknowledging this to be a close question, however, we affirm the district court's directed verdict dismissing the claim. "Extreme and outrageous" is an amorphous standard, which is necessity varies from case to case. The College's conduct may have been unprofessional, but we cannot say that it was so far removed from the bounds of civilization as not to comply with the test set forth in § 46. Russell's commendable resiliency lends support to our conclusion.

(B) *Invasion of Privacy*

In Rhode Island, this tort is purely statutory; so we refer primarily to the statute itself, especially in light of

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[7] Salve Regina claims that an illustration set forth in the Restatement closely parallels this case:

> "A is an otherwise normal girl who is a little overweight, and is quite sensitive about it. Knowing this, B tells A that she looks like a hippopotamus. This causes A to become embarrassed and angry. She broods over the incident, and is made ill. B is not liable to A."

Restatement, *supra*, § 46, comment f, illustration 13.

In view of the ongoing nature of the conduct in the instant case, as well as the control Salve Regina held over Russell's professional future, the comparison to an isolated remark, even one made with knowledge of special sensitivity, is disingenuous.

the lack of case law interpreting the text. The relevant provision, R.I.Gen.Laws § 9-1-28.1(a)(1) (1985 Reenactment), covers only "*physical* solitude or seclusion" (emphasis added).[8] The conduct at issue here does not fit easily within the scope of that language, since all of it occurred in public. The only area "invaded" was Russell's psyche. We cannot lightly predict that the Rhode Island Supreme Court would interpret the statute contrary to its literal language, in view of the statement of that Court that it will give statutory language its plain meaning absent compelling reasons to the contrary. *Fruit Growers Express Co. v. Norberg*, 471 A.2d 628 (R.I.1984). We therefore affirm the district court's directed verdict on the invasion of the privacy count.

III.

Russell's breach of contract claim is the only one the district court submitted to the jury. The College does not dispute that a student-college relationship is essentially a contractual one. *E.g., Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir.1977), *cert. denied*, 435 U.S. 971 (1978). Rather, it challenges the court's jury charge regarding the terms of the contract and the duties of the parties.

From the various catalogs, manuals, handbooks, etc., that form the contract between student and institution,

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[8] A separate section of Rhode Island's Privacy Law provides the "right to be secure from unreasonable publicity given to one's private life." R.I.Gen.Laws. § 9-1-28.1(a)(3) (1985 Reenactment). Recovery is available, however, only if a private fact is disclosed. The only material fact here, Russell's obesity, of course was quite public.

the district court, in its jury charge, boiled the agreement between the parties down to one in which Russell on the one hand was required to abide by disciplinary rules, pay tuition and maintain good academic standing,[9] and the College on the other hand was required to provide her with an education until graduation. The court informed the jury that the agreement was modified by the "contract" the parties signed during Russell's junior year. The jury was told that, if Russell "substantially performed" her side of the bargain, the College's actions constituted a breach.

The College challenges the court's characterization of the contract. It claims the court ignored relevant provisions of publications from the Nursing Department; for example, those relating to the need for nurses to be models of health for their patients. These provisions, it argues, demonstrate that Russell was aware that success as a nursing student demanded more than competent performance. We hold, however, that the provisions on health speak to the duty of students to inform the Department of hidden health problems that might affect the students or their patients, and they are not a license for administrators to decide late in the game that an obese student is not a positive model of health.[10]

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[9] There is no dispute that Russell met these criteria, with the exception of the clinical course she failed because of her weight.

[10] Judge Selya stated that "[c]ontagion was not legitimately at issue – after all, there is not allegation of communicable corpulence here – nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own wellbeing." *Russell, supra,* 649 F.Supp. at 405.

Salve Regina also challenges the application of strict commercial contract principles, *e.g.*, that, if Russell substantially performed, the College had an absolute duty to educate her.[11] It cites several cases which hold that colleges, in order properly to carry out their functions, must be given more contractual leeway than commercial parties. *E.g., Lyons, supra,* 565 F.2d at 202 (dean may reject faculty recommendation to reinstate student); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975); *Clayton v. Trustees of Princeton Univ.*, 608 F.Supp. 413 (D.N.J.1985) (university must have flexibility to discipline cheating students). There can be no doubt that courts should be slow to intrude into the sensitive area of the student-college relationship, especially in matter of curriculum and discipline. *Slaughter, supra,* 514 F.2d at 627 ("substantial performance" standard is intolerable when it allows student to get away with "a little dishonesty").

The instant case, however, differs in a very significant respect. The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to

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[11] The College also argues that the jury finding of substantial performance is not supported by the record. We hold that the record demonstrates that the finding is not clearly erroneous.

this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard to compel an institution to graduate a student merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action. *Slaughter, supra*, 514 F.2d at 626.

In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir.1984); *O'Rourke v. Eastern Air Lines Inc.*, 730 F.2d 842, 847 (2d Cir.1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error.

IV.

Salve Regina argues that the $25,000 damages awarded to Russell (the equivalent of a year's salary) constitutes legal error.[12] It contends that she is entitled to $2,000, representing her net savings after one year of employment. We disagree.

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[12] The remaining damages, $5,513.40, constitute the costs incurred for Russell's additional year in college.

Since there appears to be no case law on this precise point,[13] we turn to familiar principles of contract law. The purpose of a contract remedy is to place the injured party in as good a position as it would have been in had the breach not occurred. *Rhode Island Turnpike and Bridge Auth. v. Bethlehem Steel Corp.*, 119 R.I. 141, 379 A.2d 344, 357 (1977). Since each case turns on the specific facts at hand, we consider it appropriate to accord the district court reasonable leeway. 5 Corbin on Contracts § 992 (1964 ed.).

Here, the district court's jury charge stated specifically that the proper remedy for the breach in question would be a year's salary. We cannot say that this was incorrect as a matter of law. The contract between Salve Regina and Russell was not motivated by ecomonic concerns, at least on Russell's part; yet its breach clearly damaged Russell. She lost a year of her professional life. Under the circumstances, the salary Russell would have earned in that lost year strikes us as hardly a windfall. Moreover, the most closely analogous cases, involving damages for wrongful employment termination, hold that a plaintiff is entitled to the full salary, less any amount he was under a duty to mitigate. 5 Corbin, *supra*, § 1095 (collecting cases). We therefore affirm the damage award.

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[13] The College's reliance on *Slaughter, supra*, is unavailing. The *Slaughter* court merely held that, because the substantial performance standard was inapplicable on the facts, it was improper to award the plaintiff the amount he would have earned had he received his doctorate earlier. 514 F.2d at 626. We are faced with the reverse situation: substantial performance in fact and proper application of the standard.

V.

To summarize:

We hold that the district court properly granted a directed verdict in favor of Salve Regina on the intentional infliction of emotional distress and invasion of privacy counts. We affirm the judgment in favor of Russell on the breach of contract count. We also affirm the damage award on the contract count.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 85-0628 L

SHARON L. RUSSELL

v.

SALVE REGINA COLLEGE ET AL

Before the Honorable Ronald R. Lagueux
District Judge

THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine whether the Supreme Court of Rhode Island if faced with this case would decide whether the doctrine of substantial performance would apply. I recognize that the Rhode Island cases on this subject are largely cases involving construction contracts. The very first case that I recall is Pelletier v. Massey, which is in 49 R.I. 408. That was decided in 1928, and in that case, the Supreme Court of Rhode Island pointed out that in the context of a construction contract, that a contractor would be entitled to an installment payment if it had substantially performed the contract, and the Court in that case, especially pointed out that the trial judge had properly charged the jury in accordance with the doctrine of substantial performance, which was an accepted rule. The Court also stated that whether there was

substantial performance or not was a question of fact to be decided by the jury. There is a more recent case, I believe it's the Ferris case, which also comes up in a construction contract milieu.

Now, I have an advantage that the Court of Appeals doesn't have, and that is I was a state trial judge for 18 and 1/2 years, and I have a feel for what the Rhode Island Supreme Court will do or won't do. As a matter of fact, I charged at least two juries on the issue of substantial performance in other than construction contract situations, and I am satisfied in my own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for.

So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury.

The defendant also claims that the plaintiff hasn't proved damages. There is ample evidence in the record from which the jury could determine damages. The measure of damages in this case is a year in the life. That's what the plaintiff was deprived of, a year of her professional life, and therefore, she lost the income she would have made during that year, and she incurred additional expenses for another year of college, because she had to repeat her junior year. So I will charge the jury along that line. And the evidence is quite clear she lost roughly $25,000 in income, because she had to repeat her junior year at St. Joseph's, and she lost whatever it was, $3,000 that she had to pay, extra tuition that she had to pay, and other fees, to get that extra year. In other words, if she had gotten the benefit of her bargain, if the jury finds that the college was in breach of contract, the jury will find that the benefit of her bargain was that she would have had a degree in one more year from Salve Regina in nursing, and wouldn't have had to pay for an extra year of schooling, and would have had one year of income. So there is ample evidence from which the jury can determine damages in this case under the benefit of the bargain rule.

For all those reasons, defendant's motion for directed verdict is denied.

APPENDIX C

Sharon L. RUSSELL, Plaintiff,

v.

SALVE REGINA COLLEGE; Catherine E. Graziano, individually and in her capacity as a faculty member and as Dean of the Salve Regina College nursing department; Joan Chapdelaine, individually and in her capacity as a faculty member and clinical agency coordinator for the nursing department at Salve Regina College; Mary Lavin, individually and in her capacity as a faculty member at Salve Regina College; Maureen Hynes, individually and in her capacity as a faculty member at Salve Regina College; Barbara Dean, individually and in her capacity as a faculty member at Salve Regina College; Joann Mullaney, individually and in her capacity as a faculty member at Salve Regina College; and Sheila Megley, individually and in her capacity as a faculty member at Salve Regina College, Defendants.

Civ. A. No. 85-0628-S.

United States District Court,
D. Rhode Island.

Nov. 17, 1986.

OPINION AND ORDER

SELYA, District Judge.

This case, brought under diversity jurisdiction, 28 U.S.C. § 1332(a),[1] raises a host of intriguing federal and

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[1] Although the plaintiff has premised jurisdiction alternatively on 28 U.S.C. § 1331, her "federal question" claims necessarily march across unsteady ground. *See* Part III, *post*.

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state law questions in an exotic factual context. Briefly put, the plaintiff, Sharon Russell, a citizen and resident of East Hartford, Connecticut, was expelled from Salve Regina College ("Salve" or "College") because of her unwillingness and/or inability to control an extreme chronic weight problem. She now sues for damages. The defendants include the College and some seven Salve officials. The identity of each individual defendant and the relationship of each to the College is recounted with fidelity in the case caption, *see ante*, and it would be pleonastic to restate that data anew. The case turns on the scope of the College's unilateral authority to dismiss a student and on the manner in which the expulsion was effected in this instance.

The plaintiff's amended complaint contains some eight distinct statements of claim. The defendants have moved for summary judgment, Fed.R.Civ.P. 56(c), as to each and all of Russell's initiatives. The matter has been plethorically briefed and vigorously argued. The applicable legal standard is by now firmly embedded in federal jurisprudence; in the interests of expedition, the court merely reiterates what it said at an earlier date in *Gonsalves v. Alpine Country Club*, 563 F.Supp. 1283, 1285 (D.R.I.1983), *aff'd*, 727 F.2d 27 (1st Cir.1984):

> It is well settled that summary judgment can be granted only where there is no genuine issue as to any material fact and where the movant is

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But, inasmuch as Russell, on the one hand, and all of the defendants, on the second hand, are citizens of different states, and more than the requisite minimum amount is arguably in controversy, there is no authentic need to consider the plausibility of federal question jurisdiction.

entitled to judgment as a matter of law. *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d 985, 986 (1st Cir.1983); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir.1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976); *United Nuclear Corp. v. Cannon*, 553 F.Supp. 1220, 1226 (D.R.I.1982); *Milene Music, Inc. v. Gotauco*, 551 F.Supp. 1288, 1292 (D.R.I.1982). In determining whether these conditions have been met, the Court must view the record in the light most favorable to the party opposing the motion, *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d at 986; *John Sanderson & Co. (WOOL) Pty. Ltd. v. Ludlow Jute Co.*, 569 F.2d 696, 698 (1st Cir.1978), indulging all inferences favorable to that party. *Santoni v. Federal Deposit Insurance Corp.*, 677 F.2d 174, 177 (1st Cir.1982); *O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 686 (1st Cir. 1980).

With this preface, the court proceeds to narrate the undisputed facts,[2] to frame the issues more precisely, and to set forth its findings and conclusions.

I. BACKGROUND

Salve is a religiously affiliated college located in Newport, Rhode Island, administered by the Sisters of

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[2] The facts utilized by the court are drawn from the affidavits and documentary proffers of record, and from the parties' statements of material facts not in dispute. *See* D.R.I.L.R. 12.1, the text of which has been quoted in pertinent part in *McInnis v. Harley-Davidson Motor Co., Inc.*, 625 F.Supp. 943, 946-47 n. 2 (D.R.I.1986). As is required at this stage of the proceedings, the court has refrained from making credibility judgments, but has accepted the record at face value, indulging all contradictions and inferences in the perspective most flattering to the plaintiff.

Mercy of the Roman Catholic Church. Russell was admitted to the College by early decision in the winter of 1981-82. She began her studies in September 1982. Russell's interest in a nursing career antedated her matriculation: she had applied only to colleges with nursing programs and had expressed her intention to pursue such a course of study both in her original application to Salve and in her admissions interview. She commenced her academic endeavors at the College with the avowed intention of gaining admittance to Salve's program of nursing education.[3]

During her inaugural year at the College, there is rather fragile evidence that Russell sought some treatment for obesity. At various times during that school year, her 5'6" frame recorded weights between 306 and 315 pounds according to data on file at the College's health services unit. It is plain that, although she achieved no meaningful weight loss during her freshman year, Russell was considerably more successful as a student. Her work in liberal arts courses was adequate and her grades were respectable. Consequently, Russell was admitted to the nursing program, effective at the start of her sophomore year. She was given a copy of the "Nursing Handbook" (Handbook) issued by the College, and clearly understood that the Handbook set out the requirements for successful completion of the degree in nursing.

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[3] Though the record is less than explicit, it appears that Salve requires students to undergo a minimum of one year in a liberal arts curriculum before undertaking a nursing concentration.

The fabric of Russell's aspirations began to unravel in the fall of 1983, when she entered her sophomore year (her first as a nursing student per se). The parties have presented an intricate (and sometimes conflicting) history of the interaction between the plaintiff and her sundry academic supervisors. It would serve no useful purpose at this juncture fully to recapitulate those events, or to attempt to reconcile every conflict. After all, the mechanism of Rule 56 does not require that there be no unresolved questions of fact; it is sufficient if there are no genuine issues remaining as to any *material* facts.

It suffices for the moment to say that there were myriad problems along the way: the agonizing search for uniforms and scrub gowns that would fit a woman of Russell's girth; a tendency on the part of faculty members to employ Russell in order to model hospital procedures incident to the care of obese patients; prolonged lectures and discussions about the desirability of weight loss; and so on and so forth. Indeed, the record reveals a veritable smorgasbord of verbal exchanges characterized by one side as "torment" or "humiliation" and by the other as "expressions of concern" or "forthright statements of school policy." (It takes little imagination to decipher which litigants are wont to apply which epithets to which actions.)

The court recognizes, of course, that sadism and benevolence – like beauty – often reside principally in the eye of the beholder. And, the court has neither the need nor the means to attempt to discern the subjective motives of myriad actors on the cold, fleshless record of a Rule 56 motion. For the purposes at hand, it is enough to acknowledge that an array of such incidents occurred and

that, by the end of her sophomore year, Russell's size had become a matter of concern for all of the parties.

In her junior year, the plaintiff executed a contract (Contract) purporting to make her further participation in the College's nursing curriculum contingent upon an average weight loss of two pounds per week. The Contract was a singular sort of agreement. (It is reproduced in full as an appendix to this opinion.) Notwithstanding the signing of the Contract, Russell proved unable to meet the commitment, or even closely to approach it. Her body weight never fell appreciably below 300 pounds. Though the circumstances are complex, she seems to have made – and invariably to have broken – a series of promises in this regard. Predictably, an escalating level of tension began to characterize dealings between Russell and certain of the individual defendants.

The climax occurred on or about August 23, 1985. The plaintiff received a letter from the coordinator of the nursing program, defendant Chapdelaine, advising that she had been dismissed from the nursing department and from the college. Russell's education was concededly interrupted at that point (though, after a year's hiatus, she resumed her studies in nursing at another institution).

II. STATEMENT OF THE CASE

Russell's complaint, as noted above, contains an octet of claims. Two of these supposed causes of action – Counts VI and VII – allege "federal" claims. Count VI charges the defendants with a denial of due process and an unconstitutional interference with the plaintiff's protectible liberty and property interests. Count VII alleges

handicapped discrimination in derogation of 29 U.S.C. § 794.

The remaining six counts implicate state law, and the parties (who agree on little else) concur that Rhode Island law governs in this diversity case. The state law claims possess a variety of characteristics. Two of these initiatives are contract-based: Count I alleges nonperformance of an agreement to educate and Count II asserts breach of an implied covenant of good faith and fair dealing. Three of the remaining state law initiatives are tort-based: Counts III and VIII posit intentional and negligent infliction of emotional distress, respectively; and Count IV remonstrates against a perceived invasion of Russell's privacy. Count V – which seeks redress for wrongful dismissal – is a contract/tort hybrid.

It is alleged throughout that the plaintiff lost a year of prospective employment in a job which she claims to have been offered contingent upon successful completion of her nursing degree. Russell seeks compensatory damages for this delay and for the physical and emotional trauma which she purportedly suffered as a result of what she views as the callous, humiliating, and wrongful conduct of the several defendants. The plaintiff also prays for exemplary damages, counsel fees, and costs.[4]

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[4] The complaint, though amended as recently as June 1986, continues to pray for unspecified injunctive relief. This prayer seems largely academic at the moment. The plaintiff has pursued her studies elsewhere, *see ante*, and has manifested no enduring desire to obtain reinstatement in Salve's nursing program.

The court will first address the impact of the pending Rule 56 motion on the federal law claims, and will thereafter turn to a consideration of the other (state law) counts.

III. FEDERAL CLAIMS

Both of the claims which arise under federal law founder on essentially the same reefs and shoals: the College is not a "state actor," and its nursing curriculum is not a federally funded "program or activity" within the meaning of the Rehabitation Act of 1973, 29 U.S.C. § 794. The court need not tarry overlong in putting these claims to rest.

A. *Due Process*

With respect to what the plaintiff envisions as an utter disregard for the niceties (or even the basics) of due process, the court has no need to reach the hotly-debated questions of whether Russell enjoyed any constitutionally protected interest, created by the terms of the Handbook or distilled from any other source. The fifth and fourteenth amendments to the Constitution apply only to the federal government and to the state, respectively – and derivatively, to those whose actions can fairly be attributed to federal or state government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Even where an institution admittedly discriminates in its membership policies, there is no deprivation of due process unless the action in question sufficiently implicates the

state so as to make the conduct "state action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

To be sure, if the government plays the role of enforcer for privately originated discrimination, then the government may be forbidden to exercise its police power in furtherance of the discriminatory activity. *Shelley v. Kraemer*, 334 U.S. 1, 18-23, 68 S.Ct. 836, 844-47, 92 L.Ed. 1161 (1948). Or when the web of interconnection between the government and private bigotry is spun tightly enough to conclude that the government agency has "insinuated itself into a position of interdependence" with a discriminatory actor, then the challenged conduct must be subjected to fifth or fourteenth amendment scrutiny. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961). Those maxims do not, however assist this plaintiff. The requirement of "state action" demands more than some (modest) interplay between the public and private sectors. Justice Rehnquist's caveat in *Moose Lodge, supra*, is particularly relevant here:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and adhered to in subsequent decisions. Our holdings indicate

> that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1633, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 173, 92 S.Ct. at 1971.

The First Circuit has given further content to this standard in its decision in *McGillicuddy v. Clements*, 746 F.2d 76 (1st Cir.1984). There, the court of appeals held that an accounting firm working under a contract with the state was not sufficiently connected with the government to place its conduct within the "state action" rubric. *Id.* at 77. *McGillicuddy* makes it plain that even a close relationship with government does not suffice, absent some meaningful entanglement, to invoke the rigors of due process.

Under *Moose Lodge* and its progeny, no "state action" can be discerned here. The fact that Salve was the recipient of a (rather meagre) library grant is manifestly insufficient to carry the weight of the assertion. The fact that the College's nursing program is, in certain respects, subject to state agency approval is likewise inadequate. In *Moose Lodge*, the discriminatory actor was licensed by the state, but that was not enough to impress the imprimatur of the state on the private actor's bigotry. *Id.* 407 U.S. at 177, 92 S.Ct. at 1973. The "mere fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of the fourteenth amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S.Ct. 2764, 2771, 73

L.Ed.2d 418 (1982); *Jarrell v. Chemical Dependency Unit of Acadiana*, 791 F.2d 373, 374 (5th Cir.1983). These scraps of evidence, combined, do not turn the state action corner; and the record contains aught else. Though what little has been adduced must be construed in the light most favorable to the plaintiff, it utterly fails to demonstrate the slightest glimmer of the requisite governmental involvement. Accordingly, Count VI cannot stand.

B. *Handicapped Discrimination*

In respect to the plaintiff's statement of claim under the Rehabilitation Act, 29 U.S.C. § 794, the teachings of the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), are controlling. In *Grove City*, the Court held that a college which received federal funding only indirectly (that is, through tuition subsidies to students) was not subject in all its departments to the provisions of federal antidiscrimination law. *Id.* at 572, 104 S.Ct. at 1220. A private institution of higher education which, like Salve, receives federal monies exclusively through its students, is subject to federal antidiscrimination laws only with respect to its financial aid program. *Id.* at 574, 104 S.Ct. at 1222. And, it is well to note that, in this case, Russell does not charge that Salve discriminated against her in respect to scholarship assistance or other financial aid.

The plaintiff, although mouthing the empty conclusion that the College's nursing curriculum is a "program or activity receiving Federal financial assistance" as required by 29 U.S.C. § 794, has failed to call the court's attention to any evidentiary fact which is capable of

bearing the weight of that averment.[5] The law is transparently clear: the Supreme Court has decided the point in *Grove City* and has since cited that opinion with approval in the context of the very statute at issue here. *See Consolidated Rail Corp v. Darrone*, 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984). *See also Bento v. I.T.O. Corp. of Rhode Island*, 599 F.Supp. 731, 741-42 (D.R.I.1984). Absent proof that federal funding or financial assistance of any kind was involved in the College's nursing program, Russell can mount no cause of action against these defendants under 29 U.S.C. § 794. That being so, the difficult issue of whether Russell's obesity can be considered to be an "impairment" (handicapping condition) within the meaning of 29 U.S.C. § 706(7)(B) need not be reached – and the court expresses no opinion thereon.[6]

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[5] The trivial amounts of money that Salve received to administer so-called Pell Grants and a cryptic reference in a musty document to a "Veterans Administration reporting fee" are at best de minimis. In no way can either of these items – which aggregated well under $3000 – be construed to "fund" the College's nursing program.

[6] In passing, it can be noted that a recent case from the Fourth Circuit provides an interesting perspective on the merits of Russell's discrimination claim. In *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir.1986), an acrophobic plaintiff's handicap claim under the Rehabilitation Act of 1973 was rejected where the plaintiff testified at deposition that his fear of heights had never limited his major life activities. *Id.* at 934. Sharon Russell has testified that she does not consider herself handicapped; indeed her claim that she is well equipped to function as a nurse is central to her count in contract. *See* Part IV, *post*. The absence of the requisite federal nexus in this case obviates the need to balance Russell's denial of her handicapped status against the College's insistence that she cannot perform

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The lack of any showing of the requisite federal subsidization necessitates the grant of *brevis* disposition in the defendants' favor on Count VII of the complaint.

IV. STATE LAW CLAIMS

Conceptually, the plaintiff's claims for wrongful discharge (Count V) and for the transgression of a theoretical (implied) covenant of good faith and fair dealing (Count II) are linked by common ties in the relevant caselaw. So, the court proposes to deal with these initiatives ensemble. The same sort of approach will be taken with respect to the claims for infliction of emotional distress – intentional (Count III) and negligent (Count VIII), respectively – which likewise lend themselves to collective scrutiny. The remaining two state law causes of action will be treated individually.

A. *Dismissal*

The plaintiff's remonstrance in Count V of the complaint, which apparently seeks to draw sustenance from an analogy to the employment relationship, postulates that even a collegian who has no contractual claim to a continuing place in the student body cannot be expelled without just cause. To be sure, some jurisdictions have

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adequately as a nurse because of her corpulence. The question of whether a person who has the pluck to deny her ostensible handicap may still come within the protection of the Rehabilitation Act because she is perceived by others as handicapped must be left for another day.

evidently created such an open-ended cause of action in favor of at-will employees who have been peremptorily dismissed from their jobs. As an ultimate matter, the plaintiff's claim teeters because of her failure to discover *any* case in *any* jurisdiction from which it might be inferred that such a cause of action (if it existed at all) can – or should – be extended to the university/student context. But in this case, there is no need to speculate upon such a far-reaching extension of the at-will employment doctrine – for the underlying doctrine itself simply does not occupy a place in Rhode Island law.

In the employer-employee environment, no less an authority than the Supreme Court of Rhode Island has recently spoken of the well-settled rule that "a promise to render personal services to another for an indefinite term is terminable at any time at the will of either party." *Rotondo v. Seaboard Foundry, Inc.*, 440 A.2d 751, 752 (R.I.1981). *See also Oken v. National Chain Co.*, 424 A.2d 234, 237 (R.I.1981). Put another way, an at-will employment relationship "creates no executory obligations." *Dudzik v. Lessona Corp.*, 473 A.2d 762, 766 (R.I.1984). This hornbook principle has twice been accepted as an accurate reflection of Rhode Island law by this federal district court. *Lopez v. Bulova Watch Co., Inc.*, 582 F.Supp. 755, 767 n. 19 (D.R.I.1984) (Selya, J.); *Brainard v. Imperial Manufacturing Co.*, 571 F.Supp. 37, 39 (D.R.I.1983) (Pettine, J.). So, by logical extrapolation, Count V stands upon too unsteady a legal footing to survive the instant summary judgment motion.

It would seem that this reasoning and collocation of the authorities writs "finis" as well to the charge contained in Count II of the complaint. After all, the claim that

the defendants have breached implied covenants of good faith and fair dealing in the course of terminating the relationship between Russell and the College relies largely on caselaw from other jurisdictions in the employer/employee context, and that authority is of no consequence in Rhode Island. *See ante.* Yet, the claimant responds, this count is sustainable by reference to the decision of the state supreme court in *AAA Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co.*, 121 R.I. 96, 395 A.2d 724 (R.I.1978).

The *AAA Pool* decision is, however, a fetid sinkhole for this plaintiff. In that case, the Rhode Island Supreme Court held that the supposed existence of an implied covenent of good faith and fair dealing did not give rise to any independent cause of action in the property insurance milieu. *Id.* at 726.[7] Although the *AAA Pool* tribunal affirmed the state supreme court's earlier recognition of a generalized duty of fair dealing in contractual relationships, espoused in *Ide Farm & Stable, Inc. v. Cardi*, 110 R.I. 735, 297 A.2d 6443, 645 (R.I. 1972), that generic duty was deemed inadequate to form the basis for an independent

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[7] Some state courts, including Rhode Island's, have created causes of action of this genre in the insurance context. *See, e.g., Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I.1980); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973). And, the *Bibeault* rule has been codified by statute. *See* R.I.Gen.Laws § 9-1-33. *Bibeault*, by its terms, opens no doors outside of the insurance industry. 417 A.2d at 318-19. Likewise, the statute has no application whatever beyond the insurer/insured relationship.

cause of action in tort in *AAA Pool*. It is similarly unavailing on the facts of the instant case.

A close look at *Ide Farm* is revealing. There, the state supreme court discerned "an implied covenent of good faith and fair dealing between parties to a (purchase and sale) contract *so that contractual objectives may be achieved.*" *Id.* at 645 (emphasis supplied). The plaintiff in *Ide Farm* sought only to recover the benefit of a bargain foregone when the defendant/buyer failed to meet obligations which had arisen under a purchase and sale agreement. *Id.* at 643. *Ide Farm* did no more than acknowledge the existence of an action in contract for expectation damages against a party who failed to use best efforts to fulfill a promise. Nothing in the case suggests (or condones) the creation of an independent cause of action sounding in tort for consequential damages. The sole thrust of the opinion is toward the achievement of contractual objectives, not toward the establishment of a separate cause of action for punitive or consequential damages for tortious bad faith. Accordingly, *Ide Farm* is barren soil for the present plaintiff.

As mentioned earlier, Rhode Island has consistently rejected the notion that, without more, an action lies in favor of an at-will employee for an unfair or bad faith breach of some covenant implied by law. *See Rotondo, supra; Oken, supra. See also Lopez, supra; Brainard, supra.* Where, as here, the plaintiff was a college student rather than an employee, there is even less reason to believe that the state courts would afford her a right of action of the type which she asserts in Count II of her complaint. In the absence of any respectable precedent from the courts of Rhode Island favorable to the plaintiff's stance, and in an

ambience where no court has intruded into the groves of Academe to reach so ambitious a result, this court cannot retailor state law to suit the plaintiff's specifications. After all, "[i]t is not for this court, sitting in diversity jurisdiction, to blaze a new trail where the footprints of the state courts point conspicuously in a contrary direction." *Plummer v. Abbott Laboratories*, 568 F.Supp. 920, 927 (D.R.I.1983).

There is, under Rhode Island law, no independently actionable covenent of good faith or fair dealing implicit in the university/student relationship. And, Russell has shown nothing which would enhance her case so as to extricate it from the operation of this general principle. The defendants' Rule 56 motion for summary judgment has merit insofar as it pertains to Count II, and must be granted.

B. *Emotional Distress*

Counts III and VIII of the plaintiff's complaint dwell in the realm of emotional distress, the former alleging intentional infliction and the latter claiming injury in consequence of the defendants' negligence.

The court need pause only briefly in its consideration of Count VIII. Rhode Island law controls in this diversity case; and the state supreme court, in *Champlin v. Washington Trust Co.*, 478 A.2d 985, 988 (R.I.1984), has expressly rejected the viability of any cause of action for negligent infliction of emotional distress fashioned along the lines set out in § 313 of the Restatement (Second) Torts. Rhode Island has been slow to expand the horizons of the (narrowly-defined) cause of action for negligent infliction of

emotional harm, *see Plummer v. Abbott Laboratories*, 568 F.Supp. at 922-27 (collecting cases), and Count VIII represents far too ambitious an initiative, given the current state of Rhode Island law. A federal court, of course, "must take state law as it exists: not as it might conceivably be, some day; nor even as it should be. . . . Plaintiffs who seek out a federal forum in a diversity action should anticipate no more." *Id.* at 927.

The early demise of Count VIII does not necessarily sound a death knell for Count III, as the claim asserted therein rests on a different legal footing. In attempting to invoke the standard of the Restatement (Second) Torts § 46, Count III tracks a path which is theoretically viable. Indeed, the state supreme court has heretofore recognized the existence of a cause of action patterned after § 46. *See Champlin*, 478 A.2d at 988.

The basic requisites of an intentional infliction claim are easily stated:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such body harms.

Restatement (Second) of Torts § 46 (19[illegible]

Before addressing any questions related to the conduct alleged and its supposed effects, the court must first determine whether the university/student relationship comprises the kind of soil in which the seeds of a § 46 claim for emotional harm may sprout. We start, again, with *Champlin*, which recognized a cause of action for intentional infliction of emotional distress in the debtor-

creditor context. *Id.* at 989. Any belief that *Champlin* might be limited to its own facts, or to the collection milieu, has been dispelled by the ensuing decision in *Elias v. Youngken*, 493 A.2d 158 (R.I.1985). *Elias* held that some rather unpleasant communications between an employee and his supervisor could, in theory, furnish the basis for a cause of action for intentional infliction of emotional distress (though the particular conduct alleged in *Elias* did not meet the rigorous standard of § 46). *Id.* at 163-64. The state supreme court again assumed the existence of this particular cause of action without inquiry into its jurisprudential antecedents or conceptual underpinnings, and considered only the "threshold of conduct," 493 A.2d at 164, at which liability might be imposed. *Id.* at 163-64. Though *Elias* is sparse of phrase, both its language and tenor buttress a broad reading and application of *Champlin*. By extending the potential reach of the tort to the supervisor/employee relationship, *Elias* enhances the (already bright) prospect of construing the scope of § 46 so as to embrace other (kindred) pairings.

The caselaw from other jurisdictions does not suggest any basis for insulating the university/student setting from the operation of the general rule. *See* Note, 38 A.L.R.4th 998, 1003-1030 (1985) (reviewing cases). Without reaching the question of whether Rhode Island would limit the bounds of this tort to some particular sets of relationships, this court is persuaded that the uniquely vulnerable nature of the student's standing in the world of the university places that pairing squarely within the category of relationships which, on any reasonable taxonymy, would give rise to a duty to avoid the intentional infliction of emotional harm.

Such a conclusion marks only the beginning of the odyssey. While *Elias* as *Champlin* together imply a cause of action for intentional infliction of emotional distress, generally applicable in the circumstances of this case, there are high hurdles along the road to success on such claims. First, the concept of what might be termed "intentionality" is required to do double duty in these precincts. The interdicted conduct itself must be "intentional," that is, purposeful, wilful, or wanton. What is more, the harm that results must also be "intentional," that is, it must have been intended or least recklessly caused.

The face side of the coin is undoubtedly legible in this case. The conduct which the defendants undertook was volitional; what was done, was done purposefully. Whether or not the defendants intended the consequences that ensued, the acts that they committed vis-a-vis Russell were, without exception, the products of forethought and the conscious exercise of free will.

The flip side of the § 46 coin is much harder to read. In the *Champlin* phrase, the challenged conduct "must be intentional or in reckless disregard of the probability of causing emotional distress." 478 A.2d at 989. The plaintiff does not argue that these defendants desired to cause her to suffer, or even that they knew such suffering was substantially certain to follow from their course of conduct. Rather, Russell contends that the concept of recklessness is subsumed within the concept of intentionality for these purposes. Prosser and Keeton weigh in on plaintiff's side of this issue:

> [L]iability for extreme outrage is broader [than a literal interpretation of intentionality would allow] and extends to situations in which there is

> no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct which commonly is called wilful or wanton, or reckless.

Prosser and Keeton, *The Law of Torts* (5th ed. 1984) § 12 at 64 (discussing the requirement of extreme outrage).

There are four elements which must coincide under Rhode Island law to impose liability on such a theory:

> (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress in question must be severe.

Champlin, 478 A.2d at 989.

Points (3) and (4) are of only passing interest at this juncture. The plaintiff has testified that she suffered nightmares, sleeplessness, nausea, vomiting, diarrhea, gastric upset, and hypoglycemic attacks in the wake of the defendants' conduct. There is ample evidence in the record to withstand Rule 56 scrutiny on the last two prongs of the *Champlin* test. And, the first two prongs can, for the purposes at hand, be viewed as susceptible to measurement by a merged yardstick: reckless disregard *cum* outrageousness. The question becomes whether or not Russell has proffered enough in the way of proof to create a genuine issue of material fact as to this criterion.

The combined standard is a stringent one. The oft-cited comment (d) to § 46 of the Restatement (Second) of Torts (1965) provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Whether the conduct of a given defendant surpasses the bounds of decency is a function of three factors: (i) the conduct itself, (ii) in light of the particular relationship of the parties, (iii) having in mind the known (or knowable) susceptibility of the aggrieved party to emotional injury. These can best be assayed, in this case, in the inverse order of their appearance. Russell was a known quantity. Despite her evident sensitivity to weight-related emotional trauma, and her documented history of precarious emotional balance and tenuous self-esteem, the individual defendants – well-educated professionals all – plowed ahead. Given the full panoply of the circumstances, the proposition that they acted in reckless disregard of the probability that an obese youngster's psychic equilibrium could easily be knocked askew seems fairly debatable. This conclusion is fortified by a glimpse of the middle factor. The student stands in a particularly vulnerable relationship vis-a-vis the university, the administration, and the faculty. She is away from home,

subject to the authority and discipline of the institution, and under enormous pressure to succeed. The relationship of these parties was such that the defendants could fairly be expected to have acted maturely – and even with some tenderness and solicitude – toward the plaintiff.

Seen in this context, the defendants' conduct, as the plaintiff has portrayed it, cannot be said as a matter of law to stumble on the threshold of outrageousness. To be sure, the law does not shield a person from words or deeds which are merely inconsiderate, insulting, unflattering, or unkind. The courts possess no roving writ which warrants intervention whenever someone's feelings are hurt or someone has been subjected to a series of petty indignities. And, there must be room for some lack of courtesy and finesse in interpersonal relations. In *Champlin*, for example, the state court ultimately declined to impose liability because of the need to afford a creditor "reasonable latitude in the manner in which it seeks to collect overdue notes, even though there may be times when these methods might cause some inconvenience or embarrassment to the debtor." *Champlin*, 478 A.2d at 989-90.

Yet, the behavior challenged here, viewed in the light most favorable to the plaintiff's case, seems to be shaped of sterner stuff. Although a private college must be afforded wide discretion in enforcing its scholastic standards and in disciplining its students, there is no justification for debasement, harassment, or humiliation. The academic mise en scene, in any reasoned view, is considerably more civilized than the debtor-creditor environment, and there is correspondingly less play for

roughness.[8] Given the trust implicit in the student's selection of a college, and the peculiar vulnerability of undergraduates, the facts set forth by the plaintiff, if ultimately proven, comprise a scenario which is far more conscience-provoking than the *Champlin* counterpart. The indignities which Russell asserts have been practiced on her are arguably offensive in the extreme, perhaps repugnant to the norms which one would expect to flourish in the academic world. Taken from the plaintiff's coign of vantage, the behavior in question, if it is shown to be as obnoxious as the plaintiff in her Rule 56 opposition suggests, might well be thought by a properly-instructed jury to be so atrocious as to be actionable. As a general matter, the plaintiff appears to have raised sufficient doubt as to the quality of the defendants' actions to blunt the summary judgment ax. *See Cortes Quinones v. Jimenez Nettleship*, 773 F.2d 10, 15 (1st Cir.1985) (per curiam) (summary judgment inappropriate where the parties "have raised sufficient unanswered questions to require [the] case to go forward with more complete development of the facts.").[9]

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[8] The relationship among students – as opposed to that between the institution and the student body – is a different kettle of fish, not on today's menu.

[9] In pressing their motion for summary judgment as to Count III, the defendants have painted with the broadest imaginable stroke. Their asserted position is that Russell has not made out a claim against *any* defendant. The court has now held to the contrary. *See* text *ante*. The next logical question – whether, given the overall viability of the claim, any one or more of the defendants nevertheless deserves immunity because of the absence of evidence of individual culpability – has

(Continued on following page)

C. *Right to Privacy*

Count IV of the complaint posits a supposed invasion of Russell's privacy. No such cause of action was recognized at common law in Rhode Island. *See Champlin*, 478 A.2d 988 n. 2. The General Assembly, however, filled this perceived void in 1980 by the enactment of a statute which is now codified at R.I.Gen.Laws § 9-1-28.1 (1985 Reenactment) (Privacy Act). The Privacy Act,[10] which

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not been addressed by the movants, and the court will not gratuitously fill the void. *Cf. Blue Cross of Rhode Island v. Cannon*, 589 F.Supp. 1483, 1494 n. 15 (D.R.I.1984) (though motion to dismiss a single count of a complaint has been granted on a ground which probably undercuts certain other counts as well, court will not act sua sponte, but will await the filing of properly-focused motions). Thus, it is not necessary at this juncture to scan the record so as to assess each defendant's contribution (or lack thereof) to the miseries which Russell laments.

[10] The Privacy Act declares in pertinent part:

> (a) Right to Privacy Created. – It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
>
> (1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) It was an invasion of something that is entitled to be private or would be expected to be private;
>
> (ii) Such invasion was or is offensive or objectionable to a reasonable man; although,

(Continued on following page)

established a "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion," *Id.* at § 9-1-28.1(a)(1), must necessarily inform this court's determination of the motion sub judice insofar as the fourth count of the complaint is concerned.

The court treads on near-virgin ground in venturing to interpret this neoteric statutory right. The state

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> (B) The person who discloses such information need not benefit from such disclosure.
>
> • • •
>
> (3) The right to be secure from unreasonable publicity given to one's private life;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) There has been some publication of a private fact;
>
> (ii) The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;
>
> • • •
>
> (B) The fact which has been disclosed need not be of any benefit to the discloser of such fact.
>
> (b) Right of Action. – Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his right to privacy shall be liable to the party injured in an action at law, suit in equity or any other appropriate proceedings for redress. . . .

R.I.Gen.Laws § 9-1-28.1(a)(b) (1985 Reenactment).

supreme court, in a rather cryptic footnote in *Champlin*, 478 A.2d at 988 n. 2, wrote that Ms. Champlin's claim for invasion of privacy was moot because to "establish[ ] a violation of her right of privacy, [the plaintiff] would have had to satisfy the requirements of § 46" of the Restatement (Second) of Torts (1965). On the facts of *Champlin*, the court seemed to say, the cause of action at common law for intentional infliction of emotional distress merged, as a practical matter, with the statutory claim for invasion of privacy. In support of this proposition, the *Champlin* court cited *Dawson v. Associates Financial Services Co. of Kansas, Inc.*, 215 Kan. 814, 820, 529 P.2d 104, 110 (1974). To be sure, *Dawson* – which, like *Champlin*, was a debtor-creditor case – did treat the two causes of action interchangeably and held that the stringent standard of liability for intentional infliction of psychic harm should govern the merged claims. In so doing, however, the Kansas Supreme Court relied heavily on the nature of debtor-creditor intercourse:

> When one accepts credit, the debtor impliedly consents for the creditor to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy. . . . [D]ebtors' tender sensibilities are protected only from appressive, outrageous conduct.

Id. at 820-21, 529 P.2d at 110.

The *Dawson* court made it clear that the right of privacy is normally governed by the more relaxed standard of liability that requires a finding of conduct "highly offensive to a reasonable man." *Id.* at 822, 529 P.2d at 111. By its allusion to *Dawson* in the *Champlin* footnote, therefore, it would seem that the Rhode Island Supreme Court

placed a Restatement § 46 gloss on rights afforded by the Privacy Act only in the (predictably) rough-and-ready precincts in which the relationship of debtor and creditor holds sway. *See McMenamin v. Bishops*, 6 Wash.App. 455, 493 P.2d 1016 (1972); *Lewis v. Physicians, Etc. Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947); *Norris v. Maskin Stores, Inc.*, 272 Ala. 174, 132 So.2d 321 (1961). Yet, the case at bar arises in a far different – and more urbane – sort of institutional context, one which conduces toward reading R.I.Gen.Laws § 9-1-28.1(a)(1) exactly as it was written, thereby providing a remedy for "unreasonable intrusion upon one's physical solitude or seclusion (that). . . . was or is offensive or objectionable to a reasonable man." *Id.* The relationship is such that Russell could reasonably have expected to be granted a considerable degree of privacy as to intimate, personal matters. Thus, a literal reading of the Privacy Act reaches the perimeter of this claim. The court so holds.

Once it has been determined that Count IV states an actionable claim, the record reflects the presence of facts adequate to preclude summary judgment. Section 9-1-28.1(a)(1) does not speak in terms of the "publication" of a private fact, but rather in terms of "an invasion of something that is entitled to be private or would be expected to be private." *See ante* n. 10. To be sure, there was nothing private or confidential about Russell's corpulence (it was there to be seen at the most casual glance), so drawing attention to her girth would not, in and of itself, be actionable as an invasion of privacy under Rhode Island law. Yet, there was considerably more here: the continual inquiry into the progress of the plaintiff's diet, the scrutiny of her personal weight loss

records, the exaggerated interest in what forbidden morsels Russell ingested, and the preoccupation with her perceived lack of self-discipline, to name but a few variations on the intrusive theme which the defendants played. These provocations coalesce to fit comfortably within the species of conduct which a trier of fact could reasonably find offensive or objectionable. And, this is especially true inasmuch as few things are more personal or private to a young, single person than weight and one's efforts to control it. Accordingly, the Rule 56 motion misfires as to this statement of claim.[11]

D. *Implied Contract*

The final issue to be addressed is the contract claim asserted in Count I.[12] It is accepted law that the relationship between student and university is contractual in nature. *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir.1984); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir.1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). Concededly, the specific character of this sort of contractual relationship is somewhat amorphous. The contract is " 'not an integrated agreement, the

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[11] This is not to say that there is, on this record, a jury question as to whether *all* of the defendants invaded the plaintiff's privacy; it is merely to note the existence of evidence that *one or more* of the defendants may have done so. That being so, and the movants having eschewed any individualized attacks on the sufficiency of the proof, the court need go no further. *See ante* n. 9.

[12] Count I is asserted against the College alone, *see* Complaint ¶19(c); thus, Salve is the only movant in this wise.

standard is that of reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.' " *Id.* at 202, quoting *Giles v. Harvard University*, 428 F.Supp. 603, 605 (D.D.C.1977); *accord Cloud v. Trustees of Boston University*, 720 F.2d 721, 724 (1st Cir.1983). *See also Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10th Cir.) ("The student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category"), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 131 (1975); *Napolitano v. Princeton Univ. Trustees*, 186 N.J. Super. 548, 453 A.2d 263, 272-73 (1982) (university/student relationship cannot be described either in purely contractual or associational terms).

If a contract existed, it came into being when Russell matriculated at Salve, and she and the College, as the contracting parties, would be the real parties in interest. The nisi prius roll shows clearly that no express agreement embodied the kind of terms which the plaintiff alleges permeated the relationship. Thus, the court must ascertain whether the implied agreement between the College and its (former) pupil arguably extended far enough to support Russell's present litigation. Upon close perscrutation, the court finds that the disputed facts surrounding the terms of the "contract" provide sufficient grist to warrant turning the mill of jury deliberation. The record is not so clear as to entitle Salve to summary judgment on Count I at this stage of the proceedings.

Salve formulates a variety of positions in its search to justify *brevis* disposition of the flagship count of the plaintiff's complaint. In the first place, the institutional

defendant asseverates that the scales of "reasonable expectation" should be tipped by the provisions of the Handbook, a pamphlet which admittedly affirms the important parallel between a nursing student's health status and the health of the patients whom the nurse hopes to serve. The Handbook requires each student to inform the clinical coordinator of particular health problems; indeed, nursing students must sign a form for the clinical placement program each semester that vouchsafes full disclosure of all medical abnormalities. And, the Handbook reserves to the coordinator discretion to determine whether a student's participation in the clinical program is contraindicated form signed by all students states: "I will accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not I can function in the Clinical Area." The College has an obvious interest in ensuring that a student poses no health risk to herself or others as she proceeds into a clinical placement. But, howsoever rational the College's generalized requirements might be, the application of those requirements in Russell's case is another matter.

Contagion was not legitimately at issue – after all, there is no allegation of communicable corpulence here – nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own well-being.

The only possible bases for prohibiting the plaintiff from clinical training were either (i) that her obesity would impede satisfactory performance of her duties, or (ii) that her appearance would be a poor example for patients.

The college cannot plausibly argue, however, that Russell was bound unconditionally to accept the decision to exclude her from further participation in the clinical placement program, regardless of how arbitrary or irrational that decision might have been. As a matter of Rhode Island law, "[t]here is no doubt that ordinarily if one exacts a promise from another to perform an act the law implies a counter promise against arbitrary or unreasonable conduct on the part of the promisee." *Psaty & Fuhrman v. Housing Authority*, 68 A.2d 32, 35 (R.I.1949). And, at the very least, the reasonableness of either of the possible lines of thought limned above is open to serious question.[13]

In the circumstances at bar, there are competing inferences which can be drawn. There is evidence which, if credited, tends to show that Russell's girth did not reduce her proficiency. The argument that her overweight condition was deleterious to patients as a matter of example rests, at this point, on sheer speculation. Accordingly, the

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[13] To the extent that the printed form which Russell completed (under which the clinical coordinator's decision is classified as "final") is material to this issue, the document must be construed strictly, with all doubts resolved against Salve (as the originator of the form). This is true under Rhode Island law, *see Fryzel v. Domestic Credit Corp.*, 385 A.2d 663, 666-67 (R.I.1978); *A.C. Beals Co. v. Rhode Island Hospital*, 292 A.2d 865, 872 (R.I.1972); *Zifcak v. Monroe*, 249 A.2d 893, 896 (R.I.1969), and as a matter of interscholastic jurisprudence, *see, e.g., Corso v. Creighton University*, 731 F.2d at 533 (in university-student relationship where "contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party").

decision to expel Russell, insofar as it prescinds from the Handbook, must be tried to determine whether it was the product of reason or caprice. Summary judgment would be an inappropriate means of resolving the conflict.

The second morsel in Salve's Count I cupboard is equally unavailing. In a nutshell, the College argues that Russell failed one of the courses prerequisite to completion of her nursing degree, thereby justifying her dismissal and eliminating the need for further inquiry. Yet, there is evidence that the instructor admitted that all of Russell's deficiencies in this course were "directly related" to the claimant's obesity. On this record, a genuine question exists as to whether adiposis was, in Russell's case, a legitimate impediment to due fulfillment of the clinical requirements of the nursing program (as Salve maintains), or whether the College's evaluation was tainted by an unreasonable aversion to obesity or by a desire to expel Russell because she did not conform to the "Salve image."

There is considerable evidence in the record attesting to the plaintiff's competence as a student and as a nurse, notwithstanding her one negative evaluation by the defendant Lavin. On August 20, 1985, just one day before Chapdelaine's billet-doux was authored, the plaintiff's supervisor at Hartford Hospital, Patricia Reilly, wrote that she "looked and acted in a very professional manner. Her attendance was excellent and her performance very good. I would be most pleased to hire her as a professional nurse. In fact, I expect to be able to offer her a position for June of 1986." After her dismissal from the College, Russell was promptly admitted to the nursing program at

St. Joseph's College (also operated by the Sisters of Mercy). she completed the program there without incident.

While the court is sensitive to the importance of academic freedom and recognizes that deference must be accorded to the reasonable judgment of responsible College officials, the question of reasonableness is in too precarious a balance here to permit summary disposition. Faced with contrary opinions from qualified health care professionals and particularized allegations of personal animosity born of obesophobic obsession, this issue, viewed in the manner most hospitable to the plaintiff's case, survives Fed.R.Civ.P. 56 scrutiny.

The same sort of reasoning applies to the claim that Russell, having signed a document which pledged a weight loss of two pounds per week as a condition of continuing her studies in the College's nursing department, *see* Appendix, was open to ouster for her failure to abide by her written promise. (After all, the Contract itself provided that a failure to achieve the stated goal would result in "voluntary and immediate withdrawal from the nursing program at Salve Regina College.") But, though it is beyond dispute that the plaintiff did not shed the required poundage, issues of material fact exist as to duress, coercion, and her state of mind, generally, upon the execution of the document. Moreover, as the plaintiff notes, there was no readily ascertainable consideration for her promise. If certain (arguably plausible) inferences are drawn in the manner least favorable to the movant, the weight loss covenant can be seen not as an avenue of defense, but as a product of the invidiously discriminatory course of conduct which the defendants displayed in

Russell's case. Finally, the oxymoronic concept of a student essaying a "voluntary withdrawal" against her will, *cf. Chang v. University of Rhode Island*, 606 F.Supp. 1161, 1237 (D.R.I.1985), itself stirs doubts.

In sum, the Contract is at best a useful piece of evidence to assist in constructing the jigsaw of contractual terms, and at worst a piece of paper which is meaningless except as proof of the defendants' malevolence. In any event, it is not dispositive, as a matter of law, of the merits of Count I. It is impossible to apply the standard of "reasonable expectation," *Lyons*, 565 F.2d at 202, to Russell's situation without the aid of precisely the sort of factfinding which battens the Rule 56 hatch. Inasmuch as the viability of Russell's breach of contract claim will depend on the resolution of questions of disputed fact, *brevis* disposition must be withheld on this count.

V. CONCLUSION

The problems presented by this lawsuit are weighty in every sense of the word. The case emphasizes the uncertain configuration of the boundaries which surround important, but markedly different, values: the necessarily broad freedom which academic administrators must possess in order to operate institutions or higher learning, the rights of a student of tender years to be sheltered from gratuitous debasement or intrusiveness (or worse, from malicious conduct which offends fundamental notions of human decency), the standards of behavior which a university and an undergraduate can reasonably expect from each other. At this relatively early

stage of the instant litigation, it remains somewhat unclear as to precisely where on this dimly-lit terrain the College's conduct vis-a-vis Russell falls. So, the illumination of further factfinding seems essential in order to clarify certain of the issues and to map the rights and liabilities of the parties more exactly.

In summary, the court holds that the defendants, and each and all of them, have demonstrated an entitlement to summary judgment in their favor on Counts II, V, VI, VII, and VIII of the complaint. There are, as to these initiatives, no genuine questions of material fact. For the reasons stated, the defendants deserve to prevail thereon as a matter of law. Conversely, the motion for summary judgment must be denied as to Counts I, III, and IV of the complaint. Russell has shown enough steel to put the defendants (or some of them, *see ante* nn. 9, 11) to their mettle on these claims.

The motion for summary judgment is *granted in part and denied in part*, as outlined above. As to those counts upon which the defendants have prevailed, entry of final judgment shall be withheld pending disposition of the remaining claims. Fed. R. Civ.P. 54(b). *See Bank of New York v. Hoyt*, 108 F.R.D. 184, 186-87 (D.R.I.1985).

It is so ordered.

APPENDIX

CONTRACT

I, Sharon Russell, agree to the following conditions for continuing in Nursing 312 during the Spring 1985 Semester. I understand that failure to meet any and all of

these conditions will result in my voluntary and immediate withdrawal from the Nursing Program at Salve Regina College thus making me ineligible for Nursing 411.

1. Maintain a minimum weight loss of 2 pounds per week effective immediately.

2. Report to Mrs. Chapdelaine or Faculty Secretary weekly (every Friday morning) with evidence of progress in weight loss program. This will commence January 25, 1985.

   NB – Report January 22nd for first accounting after the holiday.

3. Maintain academic standing as required.

Additionally, I will be aware of all requirements listed in the Nursing Department Handbook, 1983-85 Edition.

/s/ Sharon Russel
Sharon Russell
Dec. 18, 1984
Date
/s/ Catherine E. Graziano, RN
Witness

(2)

No. 89-1629

In The

Supreme Court of the United States

October Term, 1989

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF FACTS

Most of the salient facts are set forth in the Joint Statement filed February 13, 1987, Par.3(a) through (nn) thereof. 2 App. Vol. I, pp. 73(a)-85(a).[1] They are amplified by the Petitioner in its Petition for Writ of Certiorari to this Honorable Court, but, of course, are presented in a light favorable to it. Since the issue here is not one of fact, but of law, we do not attempt to review them in detail but

[1] References herein are to the Joint Appendix in the record on appeal to the First Circuit.

merely synopsize them to the extent we feel necessary to complete and set for record straight.

In the Fall of 1982, the Plaintiff, Sharon L. Russell, a resident of East Hartford, Connecticut, entered the defendant, Salve Regina College, a religiously-oriented school of higher education, incorporated in Rhode Island and located in Newport, Rhode Island, as a freshman. Prior thereto she had filed with the college a health form indicating her height of 5' 6" and weight of 280 lbs. Throughout her entire college career, Sharon had a "weight problem" in that although she was continually trying to lose weight through diet and exercise, she nonetheless continued to gain weight. At one point she weighed as much as 335 pounds.

Her academic performance as a freshman was satisfactory and toward the end of that year she applied for and was granted permission to enter the college's nursing program.

Throughout her sophomore year, she experienced numerous instances when her weight, and health issues allegedly associated therewith, were the subject matters of comment by and with various faculty members. In addition there were many instances when she was humiliated by her instructors in the presence of her peers.

Her academic performance throughout her second year of college was again satisfactory, and she was admitted to full status in the nursing program.

In the Fall of 1984 she embarked upon her junior year, including certain so-called "clinical courses" – actual field experiences in a hospital setting, under the

tutelege and guidance of her professors and instructors. During the first semester of that junior year, she had two "clinical instructors", one Mary Lavin and Sandra Watters. Watters found Sharon to be an outstanding nursing student (See Plaintiff's Exhibit 36, App. Vol. III pp. 1215a-1225a), and under date of 12/13/84, she wrote therein of Russell "Sharon has demonstrated her ability to become an excellent student. She excels in professionalism, technical skills, communicates with patients and in teaching skills. RBS Staff members have also commented on Sharon's nursing excellence."

On the other hand, Lavin was of the opinion that Russell should be flunked out of the program. Her evaluation, (Plaintiff's Exhibit 37, App. Vol. III pp. 1226a-1236a) was that "the areas that are unsatisfactory are directly related to her weight problem."

On December 18, 1984, Sharon was told by Catherine E. Graziano, Dean of the Department, that by virtue of Lavin's unsatisfactory grading of her performance she could not continue in the nursing program. A serious dispute exists as to what happened next concerning the facts of how a certain 'contract' came to be. In any event the confrontation resulted in Sharon's signing the 'contract' dated December 18, 1984, (Plaintiff's Exhibit 38, App. Vol. III, p. 1237a), by the terms of which she agreed to lose a minimum of two pounds per week. It was made clear to Sharon that the signing of the contract was a *sine qua non* to her continuing in the nursing program. As Sharon said she was told 'if you don't sign this, you don't come back in the nursing program after Christmas' (App. Vol. I, p. 233a, lines 13-15).

Thereafter, through the late winter and spring of 1985, Sharon attended weight loss programs and reported religiously to Joan Chapdelaine, who was the faculty member assigned to monitor Sharon's program. Moreover, she actually achieved 'Dean's List' status during that academic semester. (App. Vol. I, p. 235a-237a). In fact at the end of her junior year in May 1985 her monitor felt Sharon was in performance of her contract and was doing 'her very level best' to live up to her contract (App. Vol. II, pp. 750a, lines 2-8). On July 25, 1985 Sharon and her mother came to Newport, Rhode Island and hired an apartment for Sharon to occupy during her senior year, and in fact, began to furnish the same. That same day they visited Mrs. Chapdelaine (App. Vol. I, pp. 259a-260a) and Mrs. Russell learned for the first time of the existence of the so-called 'contract' of December 18, 1984. She also learned from Mrs. Chapdelaine that her daughter 'did not fit the image of Salve Regina College'. (App. Vol. I, p. 260a lines 12, 13, 14).

Sharon's career at Salve Regina College came to an abrupt end on August 21, 1985 when Joan Chapdelaine, after conferring with Dean Graziano, (App. Vol. II, p. 766a) wrote a letter to Sharon (Plaintiff's Exhibit 59, App. Vol. III, p. 1273a) saying ' . . . , I have removed your name from 411 in accordance with your agreement to "voluntarily" withdraw from the nursing program if conditions were not met.'

Not long thereafter sometime in the fall of 1985 after conferring with counsel, the instant proceeding was commenced.

Travel of the Case

As a result of the action of the district court, all counts but one, the breach of contract count, of the Respondent's Amended Complaint were dismissed and no longer form a part of this litigation.[2]

The trial justice submitted the case to the jury on the sale question of whether there had been a breach of contract. From a verdict in favor of the Respondent, the Petitioner appealed to the Circuit Court of Appeals for the First Circuit. The Court denied the Appeal,[3] and it is from that action that the instant Petition for Certiorari has been filed.

This Honorable Court has requested the Respondent to file a response to the Petition.[4]

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[2] The counts alleging handicap discrimination, denial of due process and unconstitutional interference with Respondent's liberty and property interests, negligent infliction of emotional distress, wrongful dismissal, and violation of implied covenants of good faith and fair dealing, were dismissed by the district court upon Petitioner's motion for summary judgment.

The trial justice granted the motion of the individual defendants for a directed verdict on all claims against them, and also directed a verdict in favor of Petitioner on the counts alleging intentional infliction of emotional distress and invasion of privacy.

[3] 890 F.2d 484 (1st Cir. 1989)

[4] Letter of the Clerk dated May 9, 1990 to counsel of record.

Response

1. The district court did not err when it ruled the doctrine of "substantial performance" applicable to the case at bar.

2. The jury was justified in finding the Petitioner guilty of a breach of contract.

3. The Circuit Court of Appeals did not commit error when it affirmed the judgment in favor of the Respondent on the breach of contract count.

ARGUMENT

I. This is not a case of student vs. academia.

II. The doctrine of substantial performance was correctly held applicable to the case at bar.

III. The jury was justified in finding for the Respondent.

IV. The Circuit Court of Appeals did not commit error in affirming the action of the trial justice and jury.

A. The standards for appellate review have been established by this Court.

B. The Circuit Court's ruling concerning the applicability of the doctrine of substantial performance was in keeping with its well established rules of review on appeal in diversity of cases where the trial justice has ruled upon a state-law issue.

C. The alleged dichotomy between various Circuit Courts concerning the standard of review that should be adhered to by said Circuit Courts in ruling on state-law questions as determined by the district courts in diversity cases is more apparent than real.

I. This is not a case of student vs. academia.

In reviewing the case at bar it is necessary, in the first instance, to have in mind at all times, the precise nature of the "contract between the parties". We do not have here the usual situation of a contract, implied in law, from the usual documents of an application for admission, college or university handbooks which set forth academic standards to be achieved and/or maintained, disciplinary rules and regulations to be adhered to, and the simple payment of fees and expenses. Here the "contract" by action of the parties has become unique and special. The document of December 18, 1984, Respondent's Exhibit 38 (set out in Petitioner's Appendix to its Petition herein) renders the contract between the parties something special, or "one of a kind". Even the Petitioner's Dean of Nursing agrees that the December 18, 1984 "contract" was special. At Appendix Vol. II p. 709a, we find the following:

> "Q Dean Graziano, how many students have you entered into a weight loss contract with?
>
> A I don't recall.
>
> Q Anyone ever than Sharon?
>
> A No, I don't believe so.
>
> Q So that this is a unique document, is it not?
>
> A Yes, it is.
>
> Q Not duplicated neither before nor since.

A Not that I can recall."

The Trial Justice found the instant contract 'special' when on April 14, 1989 (Trial day No. 7) he said at App. Vol. II, page 891a:

> "This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties."

We are therefore dealing, not with the usual case of a student complaining of a failing grade or one accused of some disciplinary infraction such as "cheating". Rather, we are dealing with an honor student who failed to lose as much weight as she promised she would do over a given period of time. Quite a different thing than a flunking medical or law student, or one who has deliberately cheated on an examination or plagerized his or her thesis or a test essay. We are involved with a most unique situation – one for which we have been unable to find a precedent, although we have "searched the books high and low" for guidance. The invasion by the College and its faculty into the Respondent's private life is the distinguishing factor in this litigation.

II. The doctrine of substantial performance was correctly applied to the case at bar.

We recognize that the question of whether the doctrine of substantial performance was correctly applied to the case at bar by the trial justice is not technically before the Court on the instant Petition. However, the approval

thereof by the Circuit Court of Appeals is questioned by the Petitioner, insofar as it complains that the Circuit Court did not give the question plenary view.

In its "Summary" on Page 11 of its Petition, the Petitioner alleges that the District Court "created a novel and highly troubling rule of State law" in the face of relevant decisions of the Rhode Island Supreme Court. At pages 21 and 22 of its Petition, we learn that in its view, the Rhode Island Supreme Court has in the case of *National Chain Co. v. Campbell*, 482 A.2d 132 (R.I. 1985) and *Ferris v. Mann*, 99 R.I. 630, 210 A.2d 121 (1965) "long limited the application of the doctrine of 'substantial performance' to construction contract cases". Nothing in either of those cases, which admittedly are construction cases, limits the application of the doctrine to building contracts. The Rhode Island Supreme Court has not declared itself as to the doctrine's applicability to other classes of cases. There is nothing in any reported Rhode Island Supreme Court case which can be construed as indicating that that Court would do other than follow the general trend throughout the country and hold the principal to be controlling in a broad range of situations. As said in 17 Am. Jur. 2d Contracts §375 pp. 819 and 820:

> "While the doctrine of substantial performance is applied most frequently in building and construction contracts, it is not so limited and may be applied in the case of any kind of contractual obligation to perform."

In *Division of Labor Law Enforcement v. Ryan Aeronautical Co.*, 106 Cal. App. 2d Supp. 833, 236 P.2d 236, 30 A.L.R.2d 347 (1951), an employee, who had worked all but 8 days of a required full year of employment under a

collective bargaining agreement that called for vacation pay after "completion of a year's service", and whose employment was terminated without fault on his part, as a part of employer's reduction of work force for economic reasons, was held, by the application of the doctrine of specific performance, to be entitled to the vacation pay. There the California Appellate Department of Superior Court said, at page 350 A.L.R. 2d:

> "Substantial compliance, it has been said, meets the requirements of *any obligation* and what acts may constitute a compliance sufficient to meet the requirements of the law is a question to be determined on the facts in each individual case." (Emphasis supplied).

The respondent argues vigorously that the doctrine of substantial performance is not, or at least in its view of things should not be, applicable to the case at bar. Respondent has been assiduous and repetitive in espousing the position that only complete and precise compliance with every single facet "between the parties" is necessary before the Respondent can have relief. It goes on at great length about the necessity of institutions of higher learning having academic freedom to preserve their high and lofty goals and the ability to protect the integrity of the degree system and even in turn to thus protect the public from unqualified and unscrupulous graduates going about pandering their deficient knowledge and training. All of that very laudable position is wholly beside the point in this case. Every case cited by the Petitioner in its Petition in support of its position in the case at bar are cases involving questions of academic qualification and/or disciplinary measures or matters involving breach of an honor code or dishonesty violations of one type or another.

Slaughter v. Brigham Young University 514 F.2d 622 (10th Cir. 1975) was a simple case of academic dishonesty. The issue of how to interpret a "special" or "unique" contract between the school and pupil was not involved. Here Dean Graziano agreed that the "contract" with Sharon was "unique".

Sofair v. State University of N.Y., 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), as do so many of the cases, deals with an academic failure of a medical student. *Olsson v. Board of Higher Education*, 49 NY 2d 408, 402 NE2d 1150, 426 N.Y. Supp. 2d 248 (1980) falls into the same category of evaluating a student's academic qualifications.

Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) again deals with academia and not a special or unique contract. *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988) is another academic qualification case and does not in any way deal with a special or unique addendum to the usual student-institutional relationship.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507 (1985) involved a student who was dismissed for failing an important written examination. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948 (1978) dealt with a student who had been dismissed for failure to meet academic standards. *Clayton v. Trustees of Princeton University* 608 F. Supp. 413 (D. N.J. 1985) involved a case of a student cheating on an examination which constituted a breach of a student's honor code."

Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977) cert. den. 435 U.S. 971 (1978), was similarly a case arising out of a straight academic failure. It centered

about the issue about whether a three-member "appeals committee" recommendation to change a failing grade was binding on the Dean of the Nursing Department. There the Circuit Court reversed a finding by the District Court that the College had breached its agreement with the student when the Dean rejected the "recommendation". As in so many other cases cited by the Petitioner, the Court was there dealing with an academic failure.

The Trial Justice on three (3) separate occasions dealt with the doctrine and its application to the case at bar. His bench decisions at the conclusion of the Respondent's case; at the end of the Petitioner's case; and his charge to the jury in that regard are set out in Appendix A hereto. He properly applied the doctrine to the instant case.

III. The Jury was justified in finding for the Respondent.

The evidence of Sharon's performance of the "contract addendum" is really at the heart of this inquiry, and in this regard Joan Chapdelaine's testimony on cross-examination is most enlightening. At pages 72 and 73 of the transcript for April 13, 1989 (Trial Day 36) (App. Vol. II, pp. 749a & 750a) we find the following:

"Q Now, you knew what had been the experience between the date of giving her the admit card and the time she went home in May, didn't you?

A Yes, I did.

Q And at that time, you didn't pull the admit card, did you?

A No. I had every belief that Sharon was committed to fulfilling the terms of the contract. I was very positive at that time when I gave her that.

Q So that it's true that at the time she went home in May, you were satisfied that Sharon was doing her very level best to live up to her contract with the school, isn't that true?

A At that particular point in time, yes, I was.

Q *Okay. So now we have Sharon in the performance of her contract where she went home at the end of her junior year, right?*

A *Yes (Nodded).*" (emphasis supplied)

The status on July 25, 1989 as critical because nothing happened between that date and August 21, 1989 the date of dismissal, that added to anyone's fund of knowledge. In this regard, see Dean Graziano's testimony on cross-examination, page 26 of the transcript for April 13, 1989 (Trial Day #6) (App. Vol. II p. 703a)

"Q Now, Mrs. Graziano, you haven't yet told me what Mrs. Chapdelaine referred you (to) as facts that occurred between July 25, 1985 and August 21, 1985, when she said to you Sharon is not living up to the contract. Now what were those additional facts that Mrs. Chapdelaine told you, if any?

A I don't recall any.

Q None. So that she was going back really to what had happened and what she knew as of July 25, isn't that true?

A That's very possible. She was monitoring the contract. I was not."

On July 25, 1989 Sharon and her mother met with Joan Chapdelaine at her office in Salve Regina College. Sharon and her mother informed Mrs. Chapdelaine of the fact that Sharon had hired an apartment for the upcoming year and she was planning on returning to the Nursing Program for the upcoming year. Mrs. Chapdelaine said something about there being some question as to Sharon not having fulfilled her "contract" and yet allowed both Sharon and her mother to leave that conference believing that Sharon was going to go into her Senior year in good standing. With no further information, data or contact, Mrs. Chapdelaine, did, on August 21, 1985, summarily, but in cooperation with Dean Graziano, dismiss Sharon from the Nursing Program. (See page 82 of the transcript for April 13, 1989 Trial Day #6) (App. Vol. II, page 759a, 760a, 761a, 763a & 764a).

"Q Did you have any conversation with Mrs. Russell and/or Sharon about her Newport apartment that they had just come from renting?

A No.

Q They didn't tell you that?

A Yes, they did.

Q So you knew that Sharon had rented an apartment that day for the fall term at Salve Regina, did you not?

A They told me they had."

The jury was fully justified in finding that the Respondent had substantially performed her part of the bargain, and that the Petitioner was guilty of a breach of its contractual obligations.

IV. The Circuit Court of Appeals did not commit error in affirming the action of the trial justice and jury.

A. The standards for appellate review have been established by this Court.

The Petitioner seeks to have this Court reverse the Circuit Court because that Court, "(b)ased upon the First Circuit's rule of deferring to interpretations of state law made by federal judges sitting in that state", held that that Court's determination was not "reversible error".[5] The Petitioner further complains of the review it received on its other grounds of appeal, pointing to the Circuit Court's language that it deemed it "appropriate to accord the district court reasonable leeway."[6]

In support of its Petition it relies heavily upon *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984), using it as a predicate to create some alleged dichotomy between the various Circuit Courts as to the standard of review to be accorded on appeal to a district judge's holding as to a state-law issue. The Petitioner attempts to make the alleged conflict in standards into a constitutional issue of the first magnitude.

This Court, in *United States v. Hohri, et al.*, 482 U.S. 69, 107 S.Ct. 2246 (1987) has held that a district judge's determination of a state-law question usually is reviewed with great deference.[7]

This reference to the appropriate standard was made despite *Matter of McLinn, supra*, which was referred to by

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[5] 890 F.2d 484, 489 (1989)

[6] Ibid., at 490

[7] 482 U.S. 69, 74, fn 6

Mr. Justice Powell in his footnote, already cited. See also, *Linsdey v. Normet*, 405 U.S. 56, 83, 92 S. Ct. 862, 879 (1971), (Mr. Justice Douglas, dissenting in part); *MacGregor v. State Mutual Life Assur. Co.*, 315 U.S. 280, 281, 62 S. Ct. 607; *Huddleston v. Dwyer*, 322 U.S 232, 237, 64 S. Ct. 1015, 1018; *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204, 76 S. Ct. 273, 277; *General Box Co. v. U.S.*, 351 U.S. 159, 165, 169, 76 S. Ct. 728, 732, 735; and *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 281, n. 2, 70 S. Ct. 1184, 1189 (Mr. Justice Frankfurter, dissenting).

The Petitioner contends that in this case it did not get an adequate review of the district court's ruling concerning the applicability of the doctrine of substantial performance. It says the First Circuit's "deference" rule is at variance with the "de novo" rule espoused in *McLinn, supra*, and that this Court should step in and set the record straight, as to which standard should apply in Circuit Court reviews of district courts' state-law holdings. We submit this whole matter is more one of terminology than substance. The fact is that in virtually every case in which the so-called "deference" rule is stated, the Circuit Court has in reality performed a "de novo" review. We shall deal with this in more detail later.

B. The Circuit Court's ruling was in keeping with its well-established rules of review on appeal in diversity cases where the trial justice has ruled upon state-law issues.

In its opinion,[8] the Circuit Court cited not only its own holding in *Dennis v. Rhode Island Hospital Trust*

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[8] 890 F.2d 484 (1989)

National Bank, 744 F.2d 893 (1st Cir. 1984) in support of the so-called "deference" rule, but also the opinion of the Second Circuit in *O'Rourke v. Eastern Air Lines Inc.*, 730 F.2d 842 (2d Cir. 1984).

Assuming, arguendo, that the appellate court in applying the "deference" rule of "not clear error" or "great weight", based its opinion on an assumption that the district judge had some special knowledge of local law,[9] the question remains, as to how it determines "clear error" or "reversible error". The standards may be easy to express, but they are not so easily applied. We submit that there is no basis to assume that a Circuit Court blindly and slavishly adopts and approves every district court ruling on a state-law issue, simply because in the first instance it gives "deference" or "weight" to that holding. In that instant case, and in every case we have found, the Circuit Court has given full review to those state-law questions before espousing the "deferential" rule as its basis for approval. Here the appellate tribunal followed its own precedents, and those of this Honorable Court.

C. The alleged dichotomy between various Circuit Courts is more apparent than real.

The case at bar is a perfect example of how a "deferential" Circuit Court does in fact give a plenary review to a district court's holding on a state-law issue; in effect giving a "de novo" review, although clothing it in "deferential" robes.

---

[9] See, *Matter of McLinn*, 739 F.2d 1395, 1400 (9th Cir. 1984)

Here the Circuit Court carefully considered every case cited by the Petitioner in its brief to that Court, and differentiated each of them from the case at bar. It held that the usual rules applicable to "academia" were not appropriate here, because of the unique aspects of this case. The exact language of the Circuit Court is deserving of careful reading, and we have set it out in Appendix B hereto.

Thus, only after a very careful analysis of the Petitioner's arguments did the Circuit Court, in this case of first impression,[10] approve the district court's state-law question holding. It did, after a "de novo" review of the situation say in effect, "we can find no reversible error" in the district court's ruling.

McLinn, supra, was decided by a very narrowly divided court, with five (5) judges of that Court dissenting. Mr. Justice Schroder's dissent, particularly his comments at pages 1405 and 1406 of 739 F.2d are most compelling and applicable to the case at bar. As he so aptly puts it, "the problem . . . is basically one of terminology."

We respectfully submit that in the case at bar the Circuit Court did not commit error in affirming the district court's determination of the state-law question concerning the applicability of the doctrine of substantial performance. It did not commit error in otherwise affirming the district judge's handling of the issue of damage, since it approved it only after a detailed review of the matter.

[10] 890 F.2d 484, 490 (1989)

CONCLUSION

We respectfully submit that the alleged conflict between Circuits as to the appropriate appellate review standards to be applied in passing upon a district judge's holding as to a state-law question in diversity cases is more imaginary than real; founded upon the mistaken notion that those Circuits which espouse the "deferential" rule adopt the lower court's ruling blindly and without study or thought. In practice, the "deferential" Circuits do give a full and meaningful review of the law questions involved, and only when satisfied that the district judge was correct do they hold him "not clearly wrong", or "not guilty of reversible error".

We respectfully submit that there is no sound reason for this Court to enter this "war of words". The Circuit Courts of all circuits dispense even-handed, well thought out justice, whether they clothe their action in the "de novo" rule in those cases where they feel they must reverse the lower tribunal, or in the "deferential" rule when they are independently persuaded that the trial justice was correct in his legal position.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Bench Comments of Trial Justice
Re: Substantial Performance

At the conclusion of the Plaintiff's case he said at page 92 of the transcript for April 11, 1989 (Trial Day #4): (App. Vol. I p. 523a):

> "It is a very important doctrine in the law of the State of Rhode Island. If the jury can say that the Plaintiff substantially performed her contractual obligations to the college, then they can say that she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under this side agreement, then the jury can determine that the college justifiably dismissed her from the program.
>
> Neither side has talked about substantial performance to this point, but I would expect that they would give me some requests for instructions at the appropriate time on that subject."

At the end of the defendants' case on April 14, 1989, he said at pages 13, 14 and 15 of the transcript for that day (Trial Day #7): (App. Vol. II p. 820a)

> "THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine

whether the Supreme Court of Rhode Island if faced with this case would decide whether the doctrine of substantial performance would apply."

" . . . I am satisfied in my own mind that if the Supreme Court of Rhode Island has this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for. So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury."

Finally for a third time the District Court gave voice to these principles when he charged the jury on April 14 as follows: (Taken from pages 84 and 85 of the transcript of Trial Day 37) (App. Vol. II, pp. 891a & 892a)

"This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties.

Whatever view you take of the evidence, it is clear that Sharon Russell was in danger of receiving an unsatisfactory grade in her clinical course taken that fall, the medical and surgical clinical course, whose teacher was Mary Lavin. Rather than have her get an unsatisfactory in that course, it was determined by both sides that she would receive a satisfactory grade if she made the agreements contained in that written contract. The contract was signed by the plaintiff and obviously agreed to by the college through Dean Graziano, and that became a binding contract as part of the overall contractual relationship between Sharon Russell and Salve Regina College.

It is clear and undisputed that on August 21, 1985, Sharon Russell was dismissed from the nursing program because the college through its agents, Graziano and Chapdelaine, asserted that Sharon Russell had not complied with the terms of the contract.

So bringing this case down to its very simplest terms, in order for the plaintiff to recover in this case, the plaintiff must prove to you by a fair preponderance of the evidence that on August 21, 1985, she was wrongfully dismissed from the nursing program.

In order to prove that she was wrongfully dismissed from the nursing program at the time, she has to prove that she performed her obligation, and all obligations, actually, under the contract that she had, with the college, the whole contract. There is no dispute in this case that she performed adequately academically, and to that point she had a passing grade in everything, had maintained the point average that was required, that she had complied with all the rules and regulations and policies of the college, and therefore, the case comes down to the point of

whether she had complied with this special agreement of December 18, 1984.

The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

Whether there has been substantial performance of a contract in any particular circumstance is a question of fact for you, the jury, to determine."

APPENDIX B

After analyzing the cases cited by the Petitioner in support of its position that the doctrine of substantial performance should not apply to the case at bar, the Circuit Court proceeded to differentiate the instant case from those so cited, and said:

> "The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action."

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(4)

No. 89-1629

In The

Supreme Court of the United States

October Term, 1990

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 16, 1990
Certiorari Granted June 28, 1990

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RELEVANT DOCKET ENTRIES OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND
CASE NO. 88-0628 S

DATE	DOCKET ENTRY
10/3/85	Complaint filed.
10/21/85	Answer of defendants.
8/14/86	Amended Complaint filed.
11/17/86	Opinion and Order re: Motion for Summary Judgment granted in part, denied in part. As to the counts upon which defendants have prevailed, entry of final judgment shall be withheld pending disposition of remaining claims entered. (Counts II, V, VI, VII and VIII granted; Counts I, III and IV denied).
2/13/87	Joint Statement.
4/6/89	TRIAL: Day No. 1; Attorneys – Plaintiff/ Edward Hogan; Defendants/Steven E. Snow, jury sworn, foreperson/Helen Enos. Pre-instructions given, plaintiff's opening, defendants' opening, one witness, 25 exhibits.
4/7/89	TRIAL: Day No. 2; Attorneys and jurors present, witness #1 continued. Fifty-four exhibits.
4/10/89	TRIAL: Day No. 3; Attorneys and jurors present, four exhibits, three witnesses.
4/11/89	TRIAL: Day No. 4; Attorneys and jurors present, six witnesses, 14 exhibits, plaintiff rests and defendants' Motion for Directed Verdict was heard; on Count I, motion was denied, will go to jury. On Count III, directed verdict for all defendants. On Count IV, directed verdict for all defendants.
4/12/89	TRIAL: Day No. 5; Attorneys and jurors present, defendant's case; three witnesses, two exhibits.

4/13/89 TRIAL: Day No. 6; Attorneys and jurors present, two witnesses, one exhibit.

4/14/89 TRIAL: Day No. 7; Attorneys and jurors present, defendants' Motion for a Directed Verdict for College is denied. Charging conference held, closing arguments heard. Jury instruction given, jury deliberations to be resumed 9:00 a.m. on 4/17.

4/17/89 TRIAL: Day No. 8; Jury returned to deliberate @ 9:00, verdict was for the plaintiff in the amount of $30,513.40 plus interest @ 12% per annum from August 21, 1985 to April 17, 1989 totaling $14,295.01 for a total judgment of $44,808.41.

4/17/89 Judgment entered, mailed.

4/27/89 Defendant's Motion for Judgment NOV, New Trial, for Remittitur and Amendment of Judgment.

5/22/89 Hearing: Attorneys – plaintiff/Edward Hogan; defendants/Steven E. Snow, defendants present. Defendants' Motion for NOV was denied. Defendants' Motion for a New Trial with Remittitur was denied. Defendants' Motion to Amend Judgment was granted. Judgment will be entered in the amount of $43,903.45 ($30,513.40 plus interest @ 12% per annum from August 21, 1985 to April 17, 1989 totaling $13,390.05, post-judgment interest will apply). Defendants requested a stay, both sides in agreement that stay is for both sides. Attorney Hogan to do order.

5/22/89 AMENDED JUDGMENT; Entered.

5/23/89 ORDER: Defendant Salve Regina College's Motion for Judgment NOV is denied; defendant Salve Regina College's Motion for a New Trial is denied; defendant Salve Regina's Motion for Remittitur is denied; defendant

Salve Regina's Motion for Amendment of Judgment is granted; execution of Judgment is stayed pending appeal and neither party need post a supersedeas bond in connection with appeal or crossappeal, by agreement. Entered.

6/5/89 Notice of Appeal.

6/6/89 Pleadings sent to Court of Appeals with transcripts.

RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IN CASE NO. 89-1564

DATE	DOCKET ENTRY
6/8/89	Record on appeal consisting of one volume received and filed. Case docketed.
10/3/89	Heard before Justices Bownes, Torruella and Timbers.
11/20/89	Judgment: The judgment of the District Court is affirmed. Opinion of the Court by Timbers, J. No costs. Notices mailed.
12/4/89	Petition for Rehearing and Suggestion for Rehearing En Banc, received and filed.
1/16/90	ORDER: (Campbell, Chief Judge, Bownes, Breyer, Torruella, Cyr and Timbers, J.J.) denying the Petition for Rehearing and the Suggestion for Rehearing En Banc. Notices mailed.
1/24/90	Mandate issued, copy filed, original papers returned to District Court. Notices mailed.
5/2/90	Notice of filing Petition for Certiorari to the Supreme Court (89-1629) April 16, 1990, received and filed.
7/2/90	Order from the Supreme Court (June 28, 1990) granting the Petition for Writ of Certiorari limited to Question 1 presented by the petition received and filed.

AMENDED COMPLAINT FILED AUGUST 14, 1986
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL, Plaintiff :
:
VS. : C.A. No.
: 85-0628-S
SALVE REGINA COLLEGE; :
CATHERINE E. GRAZIANO, :
individually and in her :
capacity as a faculty member and as :
Dean of the Salve Regina Nursing :
Department; JOAN CHAPDELAINE, :
individually and in her :
capacity as a faculty member :
and Clinical Agency :
Coordinator for the Nursing :
Department at Salve Regina :
College; MARY LAVIN, :
individually and in her :
capacity as a faculty member :
at Salve Regina College; :
MAUREEN HYNES, individually :
and in her capacity as a :
faculty member at Salve :
Regina College; BARBARA DEAN, :
individually and in her :
capacity as a faculty member :
at Salve Regina College. :
:
Defendants :

AMENDED COMPLAINT

Plaintiff, for her Complaint and cause of action, states and alleges:

1. That the Plaintiff, Sharon L. Russell (hereinafter called Plaintiff) is a resident of East Hartford, Connecticut.

2. That the Defendant Salve Regina College (hereinafter referred to as the Defendant College) is a corporation organized and existing under the laws of the State of Rhode Island with its principal place of business in Newport, Rhode Island.

3. That the Defendant, Catherine E. Graziano resides in the state of Rhode Island and served as a faculty member, Dean, and Chairman of the Defendant college nursing department at the time Plaintiff was aggrieved.

4. That the Defendant, Joan Chapdelaine, resides in the state of Rhode Island and served as a faculty member and clinical agency coordinator in the Defendant college nursing department at the time the Plaintiff was aggrieved.

5. That the Defendants, Mary Lavin, Maureen Hynes, and Barbara Dean reside in the state of Rhode Island and served as members of the college faculty and/or administration at the time Plaintiff was aggrieved.

6. That Plaintiff asserts this Honorable Court has jurisdiction over the subject matter of this action under 28 U.S.C. §1332 (Diversity of Citizenship); 42 U.S.C. §1985 (Civil Rights); 29 U.S.C. §794 (Discrimination); and personal jurisdiction of the Defendants upon the location and/or residence of each of the above named Defendants, including the Defendant College mentioned in paragraph 2 hereof. All Defendants reside and exist in the District of Rhode Island and within the limits of the United States

District Court for the District of Rhode Island. The matter in controversy exceeds, exclusive of interests and costs, the sum of TEN THOUSAND ($10,000.00) dollars.

7. That the Plaintiff was accepted by and enrolled in the Defendant College's nursing program for the college semester beginning on or about September 1982.

8. That the Plaintiff completed her freshman, sophmore [sic] and junior years in said nursing program with the Defendant College as an honor student.

9. That for each of said years mentioned in paragraph 8 hereof the Plaintiff paid her tuition in a timely fashion; complied with all the rules and regulations of the Defendant College and the nursing department of said Defendant College and was in no way a disciplinary problem at said Defendant College.

10. That, for a long time prior to and during Plaintiff's junior year, Plaintiff was vindictively, maliciously and outrageously tormented and harassed, in a calculated and systematic fashion, by the Defendant faculty members and administrators referred to in paragraphs 3, 4 and 5, hereof acting within and without the scope of their authority as faculty members and administrators of the Defendant College; in that they continually, and without respite, harassed, harangued and barged at the Plaintiff concerning her being overweight and thus, in their words, and by their proclamation, she was a "disgrace to" and "did not fit the image of" the Defendant College and its nursing program.

11. That during, or about, October 1984, the Defendants Graziano and Lavin, acting within the scope of

their authority as faculty members of the Defendant College, confronted the Plaintiff with a document, and demanded that she sign the same, by the terms of which the Plaintiff was to agree to lose a minimum of two (2) pounds per week, effective immediately, under the threat that she would be dismissed from the Defendant College's nursing program, unless she followed this arbitrarily dictated regimen. Plaintiff refused to submit to such pressure and did not sign said document, but did, at the direction and demand of said Defendants, join "Weight Watchers" at her personal expense, and she did further at said demand and direction of said Defendants reluctantly say she would meet with the Defendant Lavin, on a weekly basis, to proclaim her successful weight loss during the preceding week, or confess her failure in this regard.

12. That, on or about December 18, 1984, immediately after Plaintiff had finished one semester exam, and while faced with another semester exam the following day, the Defendants Graziano and Lavin, acting within the scope of their authority as faculty members of the Defendant College, ordered the Plaintiff to report to the Defendant Graziano's office; there they told Plaintiff to sign a document whereby Plaintiff was to lose a minimum of two (2) pounds per week and be scrutinized weekly by the Defendant Chapdelaine, or, in the alternative, she would not be able to return to the nursing program for the next semester regardless of her grades, honor student standing, or other academic competency. The Plaintiff, distraught, distressed, and traumatized beyond the point where any twenty year old student

should be reasonably expected to make sound and prudent judgments, signed said document. A copy of this unilaterally dictated paper is attached hereto, made a part hereof and marked Exhibit A.

13. That, thereafter, and without waiting for a reasonable period of time to elapse so as to determine whether the Plaintiff was meeting those arbitraily imposed standards, the Defendant faculty members referred to in paragraphs 3, 4 and 5 hereof, acting within and without the scope of their authority for the Defendant College, continued, for the remainder of her junior year, to torment and harass her concerning her weight; continued to refer to the compact of December 18, 1984; and kept up a barrage of admonitions that the Plaintiff "did not portray the image of" the Defendant College or its nursing program and "no one will ever hire you at your weight".

14. That as a result of said actions referred to in paragraphs 10-13 hereof Plaintiff became physically ill, to the point of vomiting, lost sleep and suffered from severe nervousness and anxiety, and concern as to her future career; was subjected to ridicule, embarrassment, humiliation and degradation in the eyes of, and at the hands of, her peers and contemporaries, as well as other members of the Defendant College's faculty. This torment, humiliation, degradation and harassment continued through the summer of 1985.

15. That despite this concerted effort on the part of the Defendants to denigrate and humiliate her, and in the face of the never ceasing chiding about, and harassment

as to her weight, the Plaintiff successfully maintained honor grades for the spring semester of her junior year.

16. That, the Plaintiff did, on or about August 20, 1985, forward her tuition check for the Fall Semester 1985. Said check has been received and cashed by the defendant College.

17. That on or about August 23, 1985, the Plaintiff received a letter from the Defendant Chapdelaine who was acting within the scope of her authority as a faculty member of the Defendant College advising Plaintiff that, predicated upon the writing of December 18, 1984, she was no longer enrolled in the Defendant College nursing program. A copy of said letter is attached hereto, made a part hereof and is marked Exhibit B.

18. That, in addition to the severe physical, mental and emotional anguish, suffering and distress Plaintiff has experienced and will continue to experience as a result of the Defendant Faculty members actions as set forth above, the Plaintiff has suffered permanent and lasting impairment to her education, employment and career. By virtue of the Defendant College's arbitrary refusal to allow her to return for her senior year in the nursing program, she has been required to pursue her education elsewhere, at a sacrifice of at least one full year's credit and time toward her degree, plus the related costs and expenses of such extra study; she has lost an opportunity for full time employment, and the wages associated therewith, as a nurse in June 1986, which position had been offered her based upon her projected successful completion of education and obtainment of her

nursing degree from the Defendant College in, or about, May 1986.

COUNT I

(CONTRACT)

19. (a) Plaintiff realleges paragraphs 1-18 hereof of this Complaint as if set forth in full herein.

(b) Plaintiff alleges that it was an express and/or implied term, condition and provision of her contract, covenant and terms of educations with the Defendant College that if Plaintiff maintained her grades and academic standing, was not a disciplinary problem and otherwise complied with the rules and regulations of the Defendant College and its nursing program, the Plaintiff would be allowed to continue her nursing education at and receive her nursing degree from the Defendant College and further be treated civilly and not be tormented, or harassed by the Defendant College and the Defendant faculty members.

(c) Plaintiff alleges that the Defendant College breached the express and/or implied terms, conditions and provisions of the contract with Plaintiff by its actions and/or the actions of the Defendant faculty members acting within the scope of their authority as set forth in paragraphs 10-18 hereof.

COUNT II

(COVENANT OF GOOD FAITH AND FAIR DEALING)

20. (a) Plaintiff realleges paragraphs 1-18 hereof and sub-paragraphs (b)-(c) of Count I, paragraph 19 of this Complaint as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and/or its faculty members acting within and without the scope of their authority breached and violated the express and implied covenants of good faith and fair dealing contained in Plaintiff's contract, covenant and terms of education with the Defendant College by its actions as set forth in paragraphs 10-18 hereof.

COUNT III

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

21. a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and the Defendant faculty members and administrators, because of their position and relationships with the Plaintiff, owed the Plaintiff a special duty of care and/or had a fiduciary obligation with respect to Plaintiff.

(c) That the Defendant College, through the Defendant faculty members and administrators, acting within and without the scope of their authority specifically and intentionally inflicted upon Plaintiff gross and severe mental and emotional distress and suffering by their utterly reprehensible and outrageous conduct toward Plaintiff, as outlined in paragraphs 10-18 hereof.

COUNT IV

(INVASION OF PRIVACY)

22. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I paragraph 19 hereof.

(b) Plaintiff alleges that the Defendant College through the Defendant faculty members acting within and without the scope of their authority, specifically and intentionally invaded and intruded upon Plaintiff's seclusion and privacy rights by their patently unreasonable, offensive and intrusive conduct as set forth in paragraphs 10-18 hereof.

COUNT V

(WRONGFUL DISMISSAL)

23. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and the Defendant faculty members and administrators wrongfully dismissed and discharged Plaintiff from the Defendant College's nursing program as set forth in paragraphs 1-18 hereof; that said dismissal and discharge violates public policy; that said dismissal and discharge was motivated by bad faith; that said dismissal and discharge was malicious and based upon a socially undeniable motive.

(c) Plaintiff alleges that she has no remedy to protect her interests or the interests of society.

COUNT VI

(DUE PROCESS)

24. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College is a public college and/or operates as does a public college and/or university and/or receives both federal and state financial assistance and as such constitutes "state activity".

(c) Plaintiff alleges that she has a constitutionally protected property interest in her education as a nursing student and career potential as a registered nurse.

(d) Plaintiff alleges that she has a constitutionally protected liberty interest in her reputation as to her professional integrity and ability as a nursing student and potential career as a registered nurse.

(e) Plaintiff alleges that the Rules and Regulations of the Defendant College and of its nursing department and/or the mutually explicit or implied understandings of continued education as set forth in Count I, paragraph 19 hereof constitutes a constitutionally protected liberty and/or property interest.

(f) Plaintiff alleges therefore, that the actions of the Defendant College, through the Defendant faculty members and administrators, as set forth in paragraphs 10-18 hereof, particularly the dismissal of the Plaintiff from the Defendant College's nursing program without notice, hearing, and/or an opportunity to defend herself, violates the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 in that said action deprived Plaintiff of property and/or constitutionally protected interests without due process of law, more specifically, the decision to dismiss Plaintiff from the nursing program for being overweight, the failure to

give her notice, hearing and an opportunity to defend herself:

(i) was arbitrary, and capricious in that it was based on unlawful and irrelevant criteria:

(ii) was made without notice of the reasons for her dismissal, proper hearing and/or opportunity for Plaintiff to defend herself in accordance with generally accepted principles of fundamental fairness and due process.

(iii) was based upon unlawful criteria which differed from that uniformly applied to previous students in said Defendant Colleges nursing department.

COUNT VII

(DISCRIMINATION)

25. (a) Plaintiff repeats and re-alleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and/or its nursing program received federal financial assistance.

(c) Plaintiff alleges that she is a qualified handicapped individual as defined in 29 U.S.C. §706 (7).

(d) Plaintiff alleges that solely by reason of her handicap she was excluded from participation in, and denied the benefits of participating in the Defendant Colleges nursing program as set forth in paragraph 1-18 hereof and was thereby subject to discrimination.

(e) Plaintiff alleges that she has set forth a cause of action under 29 U.S.C. §794.

COUNT VIII

(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)

26. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and the Defendant faculty members and administrators, because of their position and relationships with the Plaintiff, owed the Plaintiff a special duty of care and/or had a fiduciary obligation with respect to Plaintiff.

(c) That the Defendant College, through the Defendant faculty members and administrators, acting within and without the scope of their authority negligently inflicted upon Plaintiff gross and severe mental and emotional distress and suffering by their negligent conduct toward Plaintiff, as outlined in paragraphs 10-18 hereof.

WHEREFORE, Plaintiff prays for judgment against the Defendant College and the other individual Defendants named herein for:

1. Injunctive relief as this Honorable Court deem appropriate under the circumstances.

2. General damages in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

3. Special damages in the amount of ONE MILLION ($1,000,000.00) DOLLARS.

4. All costs and expenses of this action including a reasonable attorneys fee for the prosecution of this claim.

5. Such other and further relief as this Honorable Court shall deem meet and just.

SHARON L. RUSSELL

By her attorneys,
HOGAN & HOGAN

/s/ Edward T. Hogan

/s/ Donald J. Packer

Edward T. Hogan, Esquire
Donald J. Packer, Esquire
HOGAN & HOGAN
201 Waterman Avenue
East Providence, RI 02914
(401) 421-3990

WHEREFORE, Plaintiff demands a trial by jury.

SHARON L. RUSSELL

By her Attorneys,
HOGAN & HOGAN

/s/ Edward T. Hogan,

/s/ Donald J. Packer,

Edward T. Hogan, Esquire
Donald J. Packer, Esquire
HOGAN & HOGAN
201 Waterman Avenue
East Providence, RI 02914
(401) 421-3990

DATED: August 13, 1986

CERTIFICATION

I hereby certify that I mailed a copy of the within Amended Complaint to Steven E. Snow, Esq. and Douglas A. Giron, Esq., One Old Stone Square, Providence, RI on August 14, 1986.

/s/ Janice K. Mulhern

EXHIBIT A

CONTRACT

I, Sharon Russell, agree to the following conditions for continuing in Nursing 312 during the Spring 1985 Semester. I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the Nursing Program at Salve Regina College thus making me ineligible for Nursing 411.

1. Maintain a minimum weight loss of 2 pounds per week effective immediately.
2. Report to Mrs. Chapdelaine or Faculty Secretary weekly (every Friday morning) with evidence of progress in weight loss program. This will commence January 25th, 1985.

   NB – Report January 22nd for first accounting after the holiday.
3. Maintain academic standing as required.

Additionally, I will be aware of all requirements listed in the Nursing Department Handbook, 1983-85 Edition.

/s/ Sharon Russell
Sharon Russell

Dec 18, 1984
Date

/s/ Catherine E. Graziano, RN.
Witness

EXHIBIT B

SALVE REGINA THE NEWPORT COLLEGE
NEWPORT, RHODE ISLAND 02840

August 21, 1985

Sharon Russell
31 Andover Road
East Hartford, CT 06108

Dear Sharon:

Per our telephone discussion of today (8/21/85) I have again reviewed the conditions of the contract that you signed on December 18, 1984.

Since you have not met the conditions for entering 411, I have removed your name from 411 in accordance with your agreement to "voluntarly" withdraw from the Nursing Program if conditions were not met.

Sincerely,

/s/ Joan Chapdelaine
Joan Chapdelaine
Clinical Agency Coordinator
Department of Nursing

Enclosure

VC:bqt

ANSWER TO AMENDED COMPLAINT
FILED AUGUST 22, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL	:	
	:	C.A. No.
v.	:	85-0628-S
SALVE REGINA COLLEGE, et al.	:	

ANSWER TO AMENDED COMPLAINT

Now come defendants in the above-captioned action, and hereby respond to the allegations contained in the plaintiff's amended complaint as follows:

FIRST DEFENSE

1. Defendants lack sufficient information to form a belief as to the truth of the matters asserted in paragraph 1 of the amended complaint.

2. Defendants admit that Salve Regina College is a non-profit tax exempt, religiously affiliated educational institution incorporated by special act of the Rhode Island General Assembly with its principal place of business in Newport, Rhode Island.

3. Defendants deny that Catherine E. Graziano is now or ever has been Dean of the Nursing Department and denies that plaintiff has been aggrieved but otherwise admits the allegations of paragraph 3.

4. Defendants deny that plaintiff has been aggrieved but otherwise admit the allegations of paragraph 4.

5. Defendants deny the Barbara Dean resides in the state of Rhode Island and deny that plaintiff has been aggrieved, but otherwise admit the allegations of paragraph 5.

6. Defendants deny each and every allegation of Paragraph 6 of the amended complaint.

7. Defendants deny the allegations of paragraph 7 of the amended complaint.

8. Defendants lack sufficient information to form a belief as to the truth of the matters asserted in paragraph 8 of the amended complaint.

9. Defendants lack sufficient information to form a belief as to the truth of the matters asserted in paragraph 9 of the amended complaint.

10. Defendants deny each and every allegation contained in Paragraph 10 of the amended complaint.

11. Defendants deny the allegations in paragraph 11 of the amended complaint.

12. Defendants deny the allegations of paragraph 12, except admit that plaintiff entered into an agreement with the College and that a copy of said agreement is attached to plaintiff's amended complaint as Exhibit A. Defendants aver affirmatively that Plaintiff entered voluntarily into said agreement.

13. Defendants deny the allegations of paragraph 13.

14. Defendants deny the allegations of Paragraph 14.

15. Defendants deny the allegations of paragraph 15.

16. Defendants admit the allegations of paragraph 16.

17. Defendants admit the genuineness of Exhibit B to plaintiff's amended complaint, but deny plaintiff's conclusions alleged in paragraph 17 of the amended complaint.

18. Defendants deny the allegations of paragraph 18 of the amended complaint.

COUNT I

19. Defendants deny each and every allegation of Paragraph 19 of the amended complaint.

COUNT II

20. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny each and every allegation of Paragraph 20 of the amended complaint.

COUNT III

21. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny the allegations of Paragraph 21 of the amended complaint.

COUNT IV

22. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny the allegations of Paragraph 22 of the amended complaint.

COUNT V

23. Defendants deny each and every allegation of paragraph 23 of the amended complaint.

COUNT VI

24. Defendants deny each and every allegation of paragraph 24 of the amended complaint.

COUNT VII

25. Defendants deny each and every allegation of paragraph 25 of the amended complaint.

COUNT VIII

26. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny the allegations of paragraph 26 of the amended complaint.

WHEREFORE, defendants demand that the court enter judgment for defendants, and that the court dismiss the plaintiff's amended complaint, with prejudice and without costs, awarding defendants their costs of suit,

plus reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

AFFIRMATIVE DEFENSES AND OTHER DEFENSES
SECOND DEFENSE

The amended complaint fails to state any claim against any of the individual defendants, Catherine E. Graziano, Joan Chapdelaine, Mary Lavin, Maureen Hynes, and Barbara Dean, inasmuch as the amended complaint asserts that said defendants were at all times acting within the scope of their employment by a disclosed Principal, defendant Salve Regina College.

THIRD DEFENSE

At no time have Salve Regina College or the individual defendant faculty members acted under color of state law, and therefore Count VI fails to state a claim upon which relief can be granted and said defendants are not subject to suit under 42 U.S.C. § 1983, the Fifth Amendment, or the Fourteenth Amendment to the United States Constitution.

FOURTH DEFENSE

Count VII of the amended complaint alleging handicap discrimination fails to state a claim upon which relief can be granted inasmuch as plaintiff is not an otherwise qualified handicapped individual within the meaning of either Section 504 of the Rehabilitation Act of 1973, or the regulations promulgated thereunder.

FIFTH DEFENSE

The Nursing Program at Salve Regina College is not a postsecondary education program or activity subject to Section 504 of the Rehabilitation Act of 1973.

SIXTH DEFENSE

Plaintiff voluntarily agreed to accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not plaintiff could function in the clinical area due to health problems. Moreover, Plaintiff agreed that she had health problems which interfered with her functioning in the nursing curriculum and voluntarily agreed to withdraw from the nursing curriculum if such health problems were not remedied. Plaintiff's failure or refusal to abide by the terms of her agreements and understandings with the College led to her temporary withdrawal from the nursing curriculum.

SEVENTH DEFENSE

Defendants plead the defenses of waiver and estoppel.

EIGHTH

The plaintiff has failed to exhaust her administrative remedies.

NINTH DEFENSE

This court lacks subject matter jurisdiction.

TENTH DEFENSE

Each and every count of the amended complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants demand that the court enter judgment for defendants, and that the court dismiss the plaintiff's amended complaint, with prejudice and without costs, awarding defendants their costs of suit, plus reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

SALVE REGINA COLLEGE,
CATHERINE E. GRAZIANO,
JOAN CHAPDELAINE,
MARY LAVIN,
MAUREEN HYNES, and
BARBARA DEAN

By their attorneys,
TILLINGHAST, COLLINS & GRAHAM

/s/ Steven E. Snow

/s/ Douglas A. Giron
Steven E. Snow
Douglas A. Giron
One Old Stone Square
Providence, RI 02903
(401) 456-1200

Dated: August 21, 1986

DEMAND FOR JURY TRIAL

Defendants demand trial by jury on all counts triable by jury.

/s/ Steven E. Snow

/s/ Douglas A. Giron
Steven E. Snow
Douglas A. Giron
TILLINGHAST, COLLINS & GRAHAM
One Old Stone Square
Providence, RI 02903
(401) 456-1200

Dated: August 21, 1986

Sharon L. RUSSELL, Plaintiff,

v.

SALVE REGINA COLLEGE; Catherine E. Graziano, individually and in her capacity as a faculty member and as Dean of the Salve Regina College nursing department; Joan Chapdelaine, individually and in her capacity as a faculty member and clinical agency coordinator for the nursing department at Salve Regina College; Mary Lavin, individually and in her capacity as a faculty member at Salve Regina College; Maureen Hynes, individually and in her capacity as a faculty member at Salve Regina College; Barbara Dean, individually and in her capacity as a faculty member at Salve Regina College; Joann Mullaney, individually and in her capacity as a faculty member at Salve Regina College; and Sheila Megley, individually and in her capacity as a faculty member at Salve Regina College, Defendants.

Civ. A. No. 85-0628-S.

United States District Court,
D. Rhode Island.

Nov. 17, 1986.

OPINION AND ORDER

SELYA, District Judge.

This case, brought under diversity jurisdiction, 28 U.S.C. § 1332(a),[1] raises a host of intriguing federal and

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[1] Although the plaintiff has premised jurisdiction alternatively on 28 U.S.C. § 1331, her "federal question" claims necessarily march across unsteady ground. *See Part III, post.* But, inasmuch as Russell, on the one hand, and all of the defendants, on the second hand, are citizens of different states,

(Continued on following page)

state law questions in an exotic factual context. Briefly put, the plaintiff, Sharon Russell, a citizen and resident of East Hartford, Connecticut, was expelled from Salve Regina College ("Salve" or "College") because of her unwillingness and/or inability to control an extreme chronic weight problem. She now sues for damages. The defendants include the College and some seven Salve officials. The identity of each individual defendant and the relationship of each to the College is recounted with fidelity in the case caption, *see ante*, and it would be pleonastic to restate that data anew. The case turns on the scope of the College's unilateral authority to dismiss a student and on the matter in which the expulsion was effected in this instance.

The plaintiff's amended complaint contains some eight distinct statements of claim. The defendants have moved for summary judgment, Fed.R.Civ.P. 56(c), as to each and all of Russell's initiatives. The matter has been plethorically briefed and vigorously argued. The applicable legal standard is by now firmly embedded in federal jurisprudence; in the interests of expedition, the court merely reiterates what it said at an earlier date in *Gonsalves v. Alpine County Club*, 563 F.Supp. 1283, 1285 (D.R.I.1983), *aff'd*, 727 F.2d 27 (1st Cir.1984):

> It is well settled that summary judgment can be granted only where there is no genuine issue as to any material fact and where the movant is

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(Continued from previous page)

and more than the requisite minimum amount is arguably in controversy, there is no authentic need to consider the plausibility of federal question jurisdiction.

entitled to judgment as a matter of law. *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d 985, 986 (1st Cir.1983); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir.1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976); *United Nuclear Corp. v. Cannon*, 553 F.Supp. 1220, 1226 (D.R.I.1982); *Milene Music, Inc. v. Gotauco*, 551 F.Supp. 1288, 1292 (D.R.I.1982). In determining whether these conditions have been met, the Court must view the record in the light most favorable to the party opposing the motion, *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d at 986; *John Sanderson & Co. (WOOL) Pty. Ltd. v. Ludlow Jute Co.*, 569 F.2d 696, 698 (1st Cir.1978), indulging all inferences favorable to that party. *Santoni v. Federal Deposit Insurance Corp.*, 677 F.2d 174, 177 (1st Cir.1982); O'Neill v. Dell Publishing Co., 630 F.2d 685, 686 (1st Cir. 1980).

With this preface, the court proceeds to narrate the undisputed facts,[2] to frame the issues more precisely, and to set forth its findings and conclusions.

I. BACKGROUND

Salve is a religiously affiliated college located in Newport, Rhode Island, administered by the Sisters of

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[2] The facts utilized by the court are drawn from the affidavits and documentary proffers of records, and from the parties' statements of material facts not in dispute. *See D.R.I.L.R. 12.1, the text of which has been quoted in pertinent part in McInnis v. Harley-Davidson Motor Co., Inc.*, 625 F.Supp. 943, 946-47 n. 2 (D.R.I.1986). As is required at this stage of the proceedings, the court has refrained from making credibility judgments, but has accepted the record at fact value, indulging all contradictions and inferences in the perspective most flattering to the plaintiff.

Mercy of the Roman Catholic Church. Russell was admitted to the College by early decision in the winter of 1981-82. She began her studies in September 1982. Russell's interest in a nursing career antedated her matriculation: she had applied only to colleges with nursing programs and had expressed her intention to pursue such a course of study both in her original application to Salve and in her admissions interview. She commenced her academic endeavors at the College with the avowed intention to gaining admittance to Salve's program of nursing education.[3]

During her inaugural year at the College, there is rather fragile evidence that Russell sought some treatment for obesity. At various times during that school year, her 5' 6" frame recorded weights between 306 and 315 pounds according to data on file at the College's health services unit. It is plain that, although she achieved no meaningful weight loss during her freshman year, Russell was considerably more successful as a student. Her work in liberal arts courses was adequate and her grades were respectable. Consequently, Russell was admitted to the nursing program, effective at the start of her sophomore year. She was given a copy of the "Nursing Handbook" (Handbook) issued by the College, and clearly understood that the Handbook set out the requirements for successful completion of the degree in nursing.

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[3] Though the record is less than explicit, it appears that Salve requires students to undergo a minimum of one year in a liberal arts curriculum before undertaking a nursing concentration.

The fabric of Russell's aspirations began to unravel in the fall of 1983, when she entered her sophomore year (her first as a nursing student per se). The parties have presented an intricate (and sometimes conflicting) history of the interaction between the plaintiff and her sundry academic supervisors. It would serve no useful purpose at this juncture fully to recapitulate those events, or to attempt to reconcile every conflict. After all, the mechanism of Rule 56 does not require that there be no unresolved questions of fact; it is sufficient if there are no genuine issues remaining as to any *material* facts.

It suffices for the moment to say that there were myriad problems along the way: the agonizing search for uniforms and scrub gowns that would fit a woman of Russell's girth; a tendency on the part of faculty members to employ Russell in order to model hospital procedures incident to the care of obese patients; prolonged lectures and discussions about the desirability of weight loss; and so on and so forth. Indeed, the record reveals a veritable smorgasbord of verbal exchanges characterized by one side as "torment" or "humiliation" and by the other as "expressions of concern" or "forthright statements of school policy." (It takes little imagination to decipher which litigants are wont to apply which epithets to which actions.)

The court recognizes, or course, that sadism and benevolence – like beauty – often reside principally in the eye of the beholder. And, the court has neither the need nor the means to attempt to discern the subjective motives of myriad actors on the cold, fleshless record of a Rule 56 motion. For the purposes at hand, it is enough to acknowledge that an array of such incidents occurred and

that, by the end of her sophomore year, Russell's size had become a matter of concern for all the parties.

In her junior year, the plaintiff executed a contract (Contract) purporting to make her further participation in the College's nursing curriculum contingent upon an average weight loss to two pounds per week. The Contract was a singular sort of agreement. (It is reproduced in full as an appendix to this opinion.) Notwithstanding the signing of the Contract, Russell proved unable to meet the commitment, or even closely to approach it. Her body weight never fell appreciably below 300 pounds. Though the circumstances are complex, she seems to have made – and invariably to have broken – a series of promises in this regard. Predictably, an escalating level of tension began to characterize dealings between Russell and certain of the individual defendants.

The climax occurred on or about August 23, 1985. The plaintiff received a letter from the coordinator of the nursing program, defendant Chapdelaine, advising that she had been dismissed from the nursing department and from the college. Russell's education was concededly interrupted at that point (though, after a year's hiatus, she resumed her studies in nursing at another institution).

II. STATEMENT OF THE CASE

Russell's complaint, as noted above, contains an octet of claims. Two of these supposed causes of action – Counts VI and VII – allege "federal" claims. Count VI charges the defendants with a denial of due process and

an unconstitutional interference with the plaintiff's protectible [sic] liberty and property interest. Count VII alleges handicapped discrimination in derogation of 29 U.S.C. § 794.

The remaining six counts implicate state law, and the parties (who agree on little else) concur that Rhode Island law governs in this diversity case. The state law claims possess a variety of characteristics. Two of these initiatives are contract-based: Count I alleges nonperformance of an agreement to educate and Count II asserts breach of an implied covenant of good faith and fair dealing. Three of the remaining state law initiatives are tort-based: Counts III and VIII posit intentional and negligent infliction of emotional distress, respectively; and Count IV remonstrates against a perceived invasion of Russell's privacy. Count V – which seeks redress for wrongful dismissal – is a contract/tort hybrid.

It is alleged throughout that the plaintiff lost a year of prospective employment in a job which she claims to have been offered contingent upon successful completion of her nursing degree. Russell seeks compensatory damages for this delay and for the physical and emotional trauma which she purportedly suffered as a result of what she views as the callous, humiliating, and wrongful conduct of the several defendants. The plaintiff also prays for exemplary damages, counsel fees, and costs.[4]

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[4] The complaint, though amended as recently as June 1986, continues to pray for unspecified injunctive relief. This prayer seems largely academic at the moment. The plaintiff has pursued her studies elsewhere, *see ante*, and has manifested no enduring desire to obtain reinstatement in Salve's nursing program.

The court will first address the impact of the pending Rule 56 motion on the federal law claims, and will thereafter turn to a consideration of the other (state law) counts.

III. FEDERAL CLAIMS

Both of the claims which arise under federal law founder on essentially the same reefs and shoals: the College is not a "state actor," and its nursing curriculum is not a federally funded "program or activity" within the meaning of the Rehabitation [sic] Act of 1973, 29 U.S.C. § 794. The court need not tarry overlong in putting these claims to rest.

A. *Due Process*

With respect to what the plaintiff envisions as an utter disregard for the niceties (or even the basics) of due process, the court has no need to reach the hotly-debated questions of whether Russell enjoyed any constitutionally protected interest, created by the terms of the Handbook or distilled from any other source. The fifth and fourteenth amendments to the Constitution apply only to the federal government and to the state, respectively – and derivatively, to those whose actions can fairly be attributed to federal or state government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Even where an institution admittedly discriminates in its membership policies, there is no deprivation of due process unless the action in question sufficiently implicates the

state so as to make the conduct "state action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

To be sure, if the government plays the role of enforcer for privately originated discrimination, then the government may be forbidden to exercise its police power in furtherance of the discriminatory activity. *Shelley v. Kraemer*, 334 U.S. 1, 18-23, 68 S.Ct. 836, 844-47, 92 L.Ed. 1161 (1948). Or when the web of interconnection between the government and private bigotry is spun tightly enough to conclude that the government agency has "insinuated itself into a position of interdependence" with a discriminatory actor, then the challenged conduct must be subjected to fifth or fourteenth amendment scrutiny. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961). Those maxims do not, however assist this plaintiff. The requirement of "state action" demands more than some (modest) interplay between the public and private sectors. Justice Rehnquist's caveat in *Moose Lodge, supra*, is particularly relevant here:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree, whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and

> adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1633, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 173, 92 S.Ct. at 1971.

The First Circuit has give further content to this standard in its decision in *McGillicuddy v. Clements*, 746 F.2d 76 (1st Cir.1984). There, the court of appeals held that an accounting firm working under a contract with the state was not sufficiently connected with the government to place its conduct within the "state action" rubric. *Id.* at 77. *McGillicuddy* makes it plain that even a close relationship with government does not suffice, absent some meaningful entanglement, to invoke the rigors of due process.

Under *Moose Lodge* and its progeny, no "state action" can be discerned here. The fact that Salve was the recipient of a (rather meagre) library grant is manifestly insufficient to carry the weight of the assertion. The fact that the College's nursing program is, in certain respects, subject to state agency approval is likewise inadequate. In *Moose Lodge*, the discriminatory actor was licensed by the state, but that was not enough to impress the imprimatur of the state on the private actor's bigotry. *Id.* 407 U.S. at 177, 92 S.Ct. at 1973. The "mere fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of the fourteenth amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). *See also Rendell-*

Baker v. Kohn, 457 U.S. 830, 841, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418 (1982); *Jarrell v. Chemical Dependency Unit of Acadiana*, 791 F.2d 373, 374 (5th Cir.1983). These scraps of evidence, combined, do not turn the state action corner; and the record contains aught else. Though what little has been adduced must be construed in the light most favorable to the plaintiff, it utterly fails to demonstrate the slightest glimmer of the requisite governmental involvement. Accordingly, Count VI cannot stand.

B. *Handicapped Discrimination*

In respect to the plaintiff's statement of claim under the Rehabilitation Act, 29 U.S.C. § 794, the teachings of the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), are controlling. In *Grove City*, the Court held that a college which received federal funding only indirectly (that is, through tuition subsidies to students) was not subject in all its departments to the provisions of federal antidiscrimination law. *Id.* at 572, 104 S.Ct. at 1220. A private institution of higher education which, like Salve, receives federal monies exclusively through its students, is subject to federal antidiscrimination laws only with respect to its financial aid program. *Id.* at 574, 104 S.Ct. at 1222. And, it is well to note that, in this case, Russell does not charge that Salve discriminated against her in respect to scholarship assistance or other financial aid.

The plaintiff, although mouthing the empty conclusion that the College's nursing curriculum is a "program or activity receiving Federal financial assistance" as required by 29 U.S.C. § 794, has failed to call the court's

attention to any evidentiary fact which is capable of bearing the weight of that averment.[5] The law is transparently clear: the Supreme Court has decided the point in *Grove City* and has since cited that opinion with approval in the context of the very statute at issue here. *See Consolidated Rail Corp v. Darrone*, 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984). *See also Bento v. I.T.O. Corp. of Rhode Island*, 599 F.Supp. 731, 741-42 (D.R.I.1984). Absent proof that federal funding or financial assistance of any kind was involved in the College's nursing program, Russell can mount no cause of action against these defendants under 29 U.S.C. § 794. That being so, the difficult issue of whether Russell's obesity can be considered to be an "impairment" (handicapping condition) within the meaning of 29 U.S.C. § 706(7)(B) need not be reached – and the court expresses no opinion thereon.[6]

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[5] The trivial amounts of money that Salve received to administer so-called Pell Grants and a cryptic reference in a musty document to a "Veterans Administration reporting fee" are at best de minimis. In no way can either of these items – which aggregated well under $3000 – be construed to "fund" the College's nursing program.

[6] In passing, it can be noted that a recent case from the Fourth Circuit provides an interesting perspective on the merits of Russell's discrimination claim. In *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir.1986), an acrophobic plaintiff's handicap claim under the Rehabilitation Act of 1973 was rejected where the plaintiff testified at deposition that his fear of heights had never limited his major life activities. *Id.* at 934. Sharon Russell has testified that she does not consider herself handicapped; indeed her claim that she is well equipped to function as a nurse is central to her count in contract. *See Part IV, post*. The absence of the requisite federal nexus in this case obviates the

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The lack of any showing of the requisite federal subsidization necessitates the grant of *brevis* disposition in the defendants' favor on Count VII of the complaint.

IV. STATE LAW CLAIMS

Conceptually, the plaintiff's claims for wrongful discharge (Count V) and for the transgression of a theoretical (implied) covenant of good faith and fair dealing (Count II) are linked by common ties in the relevant caselaw. So, the court proposes to deal with these initiatives ensemble. The same sort of approach will be taken with respect to the claims for infliction of emotional distress – intentional (Count III) and negligent (Count VIII), respectively – which likewise lend themselves to collective scrutiny. The remaining two state law causes of action will be treated individually.

A. *Dismissal*

The plaintiff's remonstrance in Count V of the complaint, which apparently seeks to draw sustenance from an analogy to the employment relationship, postulates that even a collegian who has no contractual claim to a continuing place in the student body cannot be expelled

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need to balance Russell's denial of her handicapped status against the College's insistence that she cannot perform adequately as a nurse because of her corpulence. The question of whether a person who has the pluck to deny her ostensible handicap may still come within the protection of the Rehabilitation Act because she is perceived by others as handicapped must be left for another day.

without just cause. To be sure, some jurisdictions have evidently created such an open-ended cause of action in favor of at-will employees who have been peremptorily dismissed from their jobs. As an ultimate matter, the plaintiff's claim teeters because of her failure to discover *any* case in *any* jurisdiction from which it might be inferred that such a cause of action (if it existed at all) can – or should – be extended to the university/student context. But in this case, there is no need to speculate upon such a far-reaching extension of the at-will employment doctrine – for the underlying doctrine itself simply does not occupy a place in Rhode Island law.

In the employer-employee environment, no less an authority than the Supreme Court of Rhode Island has recently spoken of the well-settled rule that "a promise to render personal services to another for an indefinite term is terminable at any time at the will of either party." *Rotondo v. Seaboard Foundry, Inc.*, 440 A.2d 751, 752 (R.I.1981). *See also Oken v. National Chain Co.*, 424 A.2d 234, 237 (R.I.1981). Put another way, an at-will employment relationship "creates no executory obligations." *Dudzik v. Lessona Corp.*, 473 A.2d 762, 766 (R.I.1984). This hornbook principle has twice been accepted as an accurate reflection of Rhode Island law by this federal district court. *Lopez v. Bulova Watch Co., Inc.*, 582 F.Supp. 755, 767 n. 19 (D.R.I.1984) (Selya, J.); *Brainard v. Imperial Manufacturing Co.*, 571 F.Supp. 37, 39 (D.R.I.1983) (Pettine, J.). So, by logical extrapolation, Count V stands upon too unsteady a legal footing to survive the instant summary judgment motion.

It would seem that this reasoning and collocation of the authorities writs "finis" as well to the charge contained in Count II of the complaint. After all, the claim that the defendants have breached implied covenants of good faith and fair dealing in the course of terminating the relationship between Russell and the College relies largely on caselaw from other jurisdiction in the employer/employee context, and that authority is of no consequence in Rhode Island. *See ante.* Yes, the claimant responds, this count is sustainable by reference to the decision of the state supreme court in *AAA Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co.*, 121 R.I. 96, 395 A.2d 724 (R.I.1978).

The *AAA Pool* decision is, however, a fetid sinkhole for this plaintiff. In that case, the Rhode Island Supreme Court held that the supposed existence of an implied covenent of good faith and fair dealing did not give rise to any independent cause of action in the property insurance milieu. *Id.* at 726.[7] Although the *AAA Pool* tribunal affirmed the state supreme court's earlier recognition of a generalized duty of fair dealing in contractual relationships, espoused in *Ide Farm & Stable, Inc. v. Cardi*, 110 R.I. 735, 297 A.2d 6443, 645 (R.I. 1972), that generic duty was

[7] Some state courts, including Rhode Island's have created causes of action of this genre in the insurance context. *See e.g., Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I.1980); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973). And, the *Bibeault* rule has been codified by statute. *See R.I.Gen.Laws* § 9-1-33. *Bibeault* by its terms, opens no doors outside of the insurance industry. 417 A.2d at 318-19. Likewise, the statute has no application whatever beyond the insurer/insured relationship.

deemed inadequate to form the basis for an independent cause of action in tort in *AAA Pool*. It is similarly unavailing on the facts of the instant case.

A close look at *Ide Farm* is revealing. There, the state supreme court discerned "an implied covenent of good faith and fair dealing between parties to a (purchase and sale) contract *so that contractual objectives may be achieved.*" *Id.* at 645 (emphasis supplied). The plaintiff in *Ide Farm* sought only to recover the benefit of a bargain foregone when the defendant/buyer failed to meet obligations which had arisen under a purchase and sale agreement. *Id.* at 643. *Ide Farm* did no more than acknowledge the existence of an action in contract for expectation damages against a party who failed to use best efforts to fulfill a promise. Nothing in the case suggests (or condones) the creation of an independent cause of action sounding in tort for consequential damages. The sole thrust of the opinion is toward the achievement of contractual objectives, not toward the establishment of a separate cause of action for punitive or consequential damages for tortious bad faith. Accordingly, *Ide Farm* is barren soil for the present plaintiff.

As mentioned earlier, Rhode Island has consistently rejected the notion that, without more, an action lies in favor of an at-will employee for an unfair or bad faith breach of some covenant implied by law. *See Rotondo, supra; Oken, supra. See also Lopez, supra; Brainard, supra.* Where, as here, the plaintiff was a college student rather than an employee, there is even less reason to believe that the state courts would afford her a right of action of the type which she asserts in Count II of her complaint. In the absence of any respectable precedent from the courts of

Rhode Island favorable to the plaintiff's stance, and in an ambience where no court has intruded into the groves of Academe to reach so ambitious a result, this court cannot retailor state law to suit the plaintiff's specifications. After all, "[i]t is not for this court, sitting in diversity jurisdiction, to blaze a new trial where the footprints of the state courts point conspicuously in a contrary direction." *Plummer v. Abbott Laboratories*, 568 F.Supp. 920, 927 (D.R.I.1983).

There is, under Rhode Island law, no independently actionable covenent of good faith or fair dealing implicit in the university/student relationship. And, Russell has shown nothing which would enhance her case so as to extricate it from the operation of this general principle. The defendants' Rule 56 motion for summary judgment has merit insofar as it pertains to Count II, and must be granted.

B. *Emotional Distress*

Counts III and VIII of the plaintiff's complaint dwell in the realm of emotional distress, the former alleging intentional infliction and the latter claiming injury in consequence of the defendants' negligence.

The court need pause only briefly in its consideration of Count VIII. Rhode Island law controls in this diversity case; and the state supreme court, in *Champlin v. Washington Trust Co.*, 478 A.2d 985, 988 (R.I.1984), has expressly rejected the viability of any cause of action for negligent infliction of emotional distress fashioned along the lines set out in § 313 of the Restatement (Second) Torts. Rhode

Island has been slow to expand the horizons of the (narrowly-defined) cause of action for negligent infliction of emotional harm, *see Plummer v. Abbott Laboratories*, 568 F.Supp. at 922-27 (collecting cases), and Count VIII represents far too ambitious an initiative, given the current state of Rhode Island law. A federal court, of course, "must take state law as it exists: not as it might conceivably be, some day; nor even as it should be. . . . Plaintiffs who seek out a federal forum in a diversity action should anticipate no more." *Id.* at 927.

The early demise of Count VIII does not necessarily sound a death knell for Count III, as the claim asserted therein rests on a different legal footing. In attempting to invoke the standard of the Restatement (Second) Torts § 46, Count III tracks a path which is theoretically viable. Indeed, the state supreme court has heretofore recognized the existence of a cause of action patterned after § 46. *See Champlin*, 478 A.2d at 988.

The basic requisites of an intentional infliction claim are easily stated:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such body harms.

Restatement (Second) of Torts § 46 (1965).

Before addressing any questions related to the conduct alleged and its supposed effects, the court must first determine whether the university/student relationship comprises the kind of soil in which the seeds of a § 46 claim for emotional harm may sprout. We start, again,

with *Champlin*, which recognized a cause of action for intentional infliction of emotional distress in the debtor-creditor context. *Id.* at 989. Any belief that *Champlin* might be limited to its own facts, or to the collection milieu, has been dispelled by the ensuing decision in *Elias v. Youngken*, 493 A.2d 158 (R.I.1985). *Elias* held that some rather unpleasant communications between an employee and his supervisor could, in theory, furnish the basis for a cause of action for intentional infliction of emotional distress (though the particular conduct alleged in *Elias* did not meet the rigorous standard of § 46). *Id* at 163-64. The state supreme court again assumed the existence of this particular cause of action without inquiry into its jurisprudential antecedents or conceptual underpinnings, and considered only the "threshold of conduct," 493 A.2d at 164, at which liability might be imposed. *Id.* at 163-64. Though *Elias* is sparse of phrase, both its language and tenor buttress a broad reading and application of *Champlin*. By extending the potential reach of the tort to the supervisor/employee relationship, *Elias* enhances the (already bright) prospect of construing the scope of § 46 so as to embrace other (kindred) pairings.

The caselaw from other jurisdictions does not suggest any basis for insulating the university/student setting from the operation of the general rule. *See* Note, 38 A.L.R.4th 998, 1003-1030 (1985) (reviewing cases). Without reaching the question of whether Rhode Island would limit the bounds of this tort to some particular sets of relationships, this court is persuaded that the uniquely vulnerable nature of the student's standing in the world of the university places that pairing squarely within the

category of relationships which, on any reasonable taxonomy, would give rise to a duty to avoid the intentional infliction of emotional harm.

Such a conclusion marks only the beginning of the odyssey. While *Elias* and *Champlin* together imply a cause of action for intentional infliction of emotional distress, generally applicable in the circumstances of this case, there are high hurdles along the road to success on such claims. First, the concept of what might be termed "intentionality" is required to do double duty in these precincts. The interdicted conduct itself must be "intentional," that is, purposeful, wilful, or wanton. What is more, the harm that results must also be "intentional," that is, it must have been intended or least recklessly caused.

The face side of the coin is undoubtedly legible in this case. The conduct which the defendants undertook was volitional; what was done, was done purposefully. Whether or not defendants intended the consequences that ensued, the acts that they committed vis-a-vis Russell, were, without exception, the products of forethought and the conscious exercise of free will.

The flip side of the § 46 coin is much harder to read. In the *Champlin* phrase, the challenged conduct "must be intentional or in reckless disregard of the probability of causing emotional distress." 478 A.2d at 989. The plaintiff does not argue that these defendants desired to cause her to suffer, or even that they knew such suffering was substantially certain to follow from their course of conduct. Rather, Russell contends that the concept of recklessness is subsumed within the concept of intentionality

for these purposes. Prosser and Keeton weigh in on plaintiff's side of this issue:

> [L]iability for extreme outrage is broader [than a literal interpretation of intentionality would allow] and extends to situations in which there is no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct which commonly is called wilful or wanton, or reckless.

Prosser and Keeton, *The Law of Torts* (5th ed. 1984) § 12 at 64 (discussing the requirement of extreme outrage).

There are four elements which must coincide under Rhode Island law to impose liability on such a theory:

> (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress in question must be severe.

Champlin, 478 A.2d at 989.

Points (3) and (4) are of only passing interest at this juncture. The plaintiff has testified that she suffered nightmares, sleeplessness, nausea, vomiting, diarrhea, gastric upset, and hypoglycemic attacks in the wake of the defendants' conduct. There is ample evidence in the record to withstand Rule 56 scrutiny on the last two prongs of the *Champlin* test. And, the first two prongs can, for the purposes at hand, be viewed as susceptible to measurement by a merged yardstick: reckless disregard *cum* outrageousness. The question becomes whether or

not Russell has proffered enough in the way of proof to create a genuine issue of material fact as to this criterion.

The combined standard is a stringent one. The oft-cited comment (d) to § 46 of the Restatement (Second) of Torts (1965) provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Whether the conduct of a given defendant surpasses the bounds of decency is a function of three factors: (i) the conduct itself, (ii) in light of the particular relationship of the parties, (iii) having in mind the known (or knowable) susceptibility of the aggrieved party to emotional injury. These can best be assayed, in this case, in the inverse order of their appearance. Russell was a known quantity. Despite her evident sensitivity to weight-related emotional trauma, and her documented history of precarious emotional balance and tenuous self-esteem, the individual defendants – well-educated professionals all – plowed ahead. Given the full panoply of

the circumstances, the proposition that they acted in reckless disregard of the probability that an obese youngster's psychic equilibrium could easily be knocked askew seems fairly debatable. This conclusion is fortified by a glimpse of the middle factor. The student stands in a particularly vulnerable relationship vis-a-vis the university, the administration, and the faculty. She is away from home, subject to the authority and discipline of the institution, and under enormous pressure to succeed. The relationship of these parties was such that the defendants could fairly be expected to have acted maturely – and even with some tenderness and solicitude – toward the plaintiff.

Seen in this context, the defendants' conduct, as the plaintiff has portrayed it, cannot be said as a matter of law to stumble on the threshold of outrageousness. To be sure, the law does not shield a person from words or deeds which are merely inconsiderate, insulting, unflattering, or unkind. The courts possess no roving writ which warrants intervention whenever someone's feelings are hurt or someone has been subjected to a series of petty indignities. And, there must be room for some lack of courtesy and finesse in interpersonal relations. In *Champlin*, for example, the state court ultimately declined to impose liability because of the need to afford a creditor "reasonable latitude in the manner in which it seeks to collect overdue notes, even though there may be times when these methods might cause some inconvenience or embarrassment to the debtor." *Champlin*, 478 A.2d at 989-90.

Yet, the behavior challenged here, viewed in the light most favorable to the plaintiff's case, seems to be shaped of sterner stuff. Although a private college must be

afforded wide discretion in enforcing its scholastic standards and in disciplining its students, there is no justification for debasement, harassment, or humiliation. The academic mise en scene, in any reasoned view, is considerably more civilized that the debtor-creditor environment, and there is correspondingly less play for roughness.[8] Given the trust implicit in the student's selection of a college, and the peculiar vulnerability of undergraduates, the facts set forth by the plaintiff, if ultimately proven, comprise a scenario which is far more conscience-provoking than the *Champlin* counterpart. The indignities which Russell asserts have been practiced on her are arguably offensive in the extreme, perhaps repugnant to the norms which one would expect to flourish in the academic world. Taken from the plaintiff's coign of vantage, the behavior in question, if it is shown to be as obnoxious as the plaintiff in her Rule 56 opposition suggests, might well be thought by a properly-instructed jury to be so atrocious as to be actionable. As a general matter, the plaintiff appears to have raised sufficient doubt as to the quality of the defendants' actions to blunt the summary judgment ax. *See Cortes Quinones v. Jimenez Nettleship*, 773 F.2d 10, 15 (1st Cir.1985) (per curiam) (summary judgment inappropriate where the parties "have raised sufficient unanswered questions to require [the] case to go forward with more complete development of the facts.").[9]

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[8] The relationship among students – as opposed to that between the institution and the student body – is a different kettle of fish, not on today's menu.

[9] In pressing their motion for summary judgment as to Count III, the defendants have painted with the broadest

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C. *Right to Privacy*

Count IV of the complaint posits a supposed invasion of Russell's privacy. No such cause of action was recognized at common law in Rhode Island. *See Champlin*, 478 A.2d 988 n.2. The General Assembly, however, filled this perceived void in 1980 by the enactment of a statute which is now codified at R.I.Gen.Laws § 9-1-28.1 (1985 Reenactment) (Privacy Act). The Privacy Act,[10] which

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imaginable stroke. Their asserted position is that Russell has not made out a claim against *any* defendant. The court has now held to the contrary. *See* text *ante*. The next logical question – whether, given the overall viability of the claim, any one or more of the defendants nevertheless deserves immunity because of the absence of evidence of individual culpability – has not been addressed by the movants, and the court will not gratuitously fill the void. *Cf. Blue Cross of Rhode Island v. Cannon*, 589 F.Supp. 1483, 1494 n. 15 (D.R.I.1984) (though motion to dismiss a single count of a complaint has been granted on a ground which probably undercuts certain other counts as well, court will not act sua sponte, but will await the filing of properly-focused motions). Thus, it is not necessary at this juncture to scan the record so as to assess each defendant's contribution (or lack thereof) to the miseries which Russell laments.

[10] The Privacy Act declares in pertinent part:

> (a) Right to Privacy Created. – It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
>
> (1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;

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established a "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion," *Id.* at

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> (A) In order to recover for violation of this right, it must be established that:
>
> (i) It was an invasion of something that is entitled to be private or would be expected to be private;
>
> (ii) Such invasion was or is offensive or objectionable to a reasonable man; although,
>
> (B) The person who discloses such information need not benefit from such disclosure.
>
> * * *
>
> (3) The right to be secure from unreasonable publicity given to one's private life;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) There has been some publication of a private fact;
>
> (ii) The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;
>
> * * *
>
> (B) The fact which has been disclosed need not be of any benefit to the discloser of such fact.
>
> (b) Right of Action. – Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his right to privacy shall be liable to the party injured in an action at law, suit in equity or any other appropriate proceedings for redress. . . .

R.I.Gen.Laws § 9-1-28.1(a)(b) (1985 Reenactment).

§ 9-1-28.1(a)(1), must necessarily inform this court's determination of the motion sub judice insofar as the fourth count of the complaint is concerned.

The court treads on near-virgin ground in venturing to interpret this neoteric statutory right. The state supreme court, in a rather cryptic footnote in *Champlin*, 478 A.2d at 988 n. 2, wrote that Ms. Champlin's claim for invasion of privacy was moot because to "establish[] a violation of her right of privacy, [the plaintiff] would have had to satisfy the requirements of § 46" of the Restatement (Second) of Torts (1965). On the facts of *Champlin*, the court seemed to say, the cause of action at common law for intentional infliction of emotional distress merged, as a practical matter, with the statutory claim for invasion of privacy. In support of this proposition, the *Champlin* court cited *Dawson v. Associates Financial Services Co. of Kansas, Inc.*, 215 Kan. 814, 820, 529 P.2d 104, 110 (1974). To be sure, *Dawson* – which, like *Champlin*, was a debtor-creditor case – did treat the two causes of action interchangeably and held that the stringent standard of liability for intentional infliction of psychic harm should govern the merged claims. In so doing, however, the Kansas Supreme Court relied heavily on the nature of debtor-creditor intercourse:

> When one accepts credit, the debtor impliedly consents for the creditor to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy. . . . [D]ebtor's tender sensibilities are protected only from oppressive, outrageous conduct.

Id. at 820-21, 529 P.2d at 110.

The *Dawson* court made it clear that the right of privacy is normally governed by the more relaxed standard of liability that requires a finding of conduct "highly offensive to a reasonable man." *Id.* at 822, 529 P.2d at 111. By its allusion to *Dawson* in the *Champlin* footnote, therefore, it would seem that the Rhode Island Supreme Court placed a Restatement § 46 gloss on rights afforded by the Privacy Act only in the (predictably) rough-and-ready precincts in which the relationship of debtor and creditor holds sway. *See McMenamin v. Bishops*, 6 Wash.App. 455, 493 P.2d 1016 (1972); *Lewis v. Physicians, Etc. Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947); *Norris v. Maskin Stores, Inc.*, 272 Ala. 174, 132 So.2d 321 (1961). Yet, the case at bar arises in a far different – and more urbane – sort of institutional context, one which conduces toward reading R.I.Gen.Laws § 9-1-28.1(a)(1) exactly as it was written, thereby providing a remedy for "unreasonable intrusion upon one's physical solitude or seclusion (that). . . . was or is offensive or objectionable to a reasonable man." *Id.* The relationship is such that Russell could reasonably have expected to be granted a considerable degree of privacy as to intimate, personal matters. Thus, a literal reading of the Privacy Act reaches the perimeter of this claim. The court so holds.

Once it has been determined that Count IV states an actionable claim, the record reflects the presence of facts adequate to preclude summary judgment. Section 9-1-28.1(a)(1) does not speak in terms of the "publication" of a private fact, but rather in terms of "an invasion of something that is entitled to be private or would be expected to be private." *See ante.* n. 10. To be sure, there

was nothing private or confidential about Russell's corpulence (it was there to be seen at the most casual glance), so drawing attention to her girth would not, in and of itself, be actionable as an invasion of privacy under Rhode Island law. Yet, there was considerably more here: the continual inquiry into the progress of the plaintiff's diet, the scrutiny of her personal weight loss records, the exaggerated interest in what forbidden morsels Russell ingested, and the preoccupation with her perceived lack of self-discipline, to name but a few variations on the intrusive theme which the defendants played. These provocations coalesce to fit comfortably within the species of conduct which a trier of fact could reasonably find offensive or objectionable. And, this is especially true inasmuch as few things are more personal or private to a young, single person than weight and one's efforts to control it. Accordingly, the Rule 56 motion misfires as to the statement of claim.[11]

D. *Implied Contract*

The final issue to be addressed is the contract claim asserted in Count I.[12] It is accepted law that the

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[11] This is not to say that there is, on this record, a jury question as to whether *all* of the defendants invaded the plaintiff's privacy; it is merely to note the existence of evidence that *one or more* of the defendants may have done so. That being so, and the movants having eschewed any individualized attacks on the sufficiency of the proof, the court need go no further. *See ante* n. 9.

[12] Count I is asserted against the College alone, *see* Complaint ¶19(c); thus, Salve is the only movant in this wise.

relationship between student and university is contractual in nature. *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir.1984); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir.1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). Concededly, the specific character of this sort of contractual relationship is somewhat amorphous. The contract is " 'not an integrated agreement, the standard is that of reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.' " *Id.* at 202, quoting *Giles v. Harvard University*, 428 F.Supp. 603, 605 (D.D.C.1977); *accord Cloud v. Trustees of Boston University*, 720 F.2d 721, 724 (1st Cir.1983). *See also Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10th Cir.) ("The student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category"), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 131 (1975); *Napolitano v. Princeton Univ. Trustees*, 186. N.J. Super. 548, 458, 453 A.2d 263, 272-73 (1982) (university/student relationship cannot be described either in purely contractual or associational terms).

If a contract existed, it came into being when Russell matriculated at Salve, and she and the College, as the contracting parties, would be the real parties in interest. The nisi prius roll shows clearly that no express agreement embodied the kind of terms which the plaintiff alleges permeated the relationship. Thus, the court must ascertain whether the implied agreement between the College and its (former) pupil arguably extended far enough to support Russell's present litigation. Upon close

perscrutation, the court finds that the disputed facts surround the terms of the "contract" provided sufficient grist to warrant turning the mill of jury deliberation. The record is not so clear as to entitle Salve to summary judgment on Count I at this stage of the proceedings.

Salve formulates a variety of positions in its search to justify *brevis* disposition of the flagship count of the plaintiff's complaint. In the first place, the institutional defendant asseverates that the scales of "reasonable expectation" should be tipped by the provisions of the Handbook, a pamphlet which admittedly affirms the important parallel between a nursing student's health status and the health of the patients whom the nurse hopes to serve. The Handbook requires each student to inform the clinical coordinator of particular health problems; indeed, nursing students must sign a form for the clinical placement program each semester that vouchsafes full disclosure of all medical abnormalities. And, the Handbook reserves to the coordinator discretion to determine whether a student's participation in the clinical program is contraindicated because of health. The standardized form signed by all students states: "I will accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not I can function in the Clinical Area." The College has an obvious interest in ensuring that a student poses no health risk to herself or others as she proceeds into a clinical placement. But, howsoever rational the College's generalized requirements might be, the application of those requirements in Russell's case is another matter.

Contagion was not legitimately at issue – after all, there is no allegation of communicable corpulence here –

nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own wellbeing.

The only possible bases for prohibiting the plaintiff from clinical training were either (i) that her obesity would impede satisfactory performance of her duties, or (ii) that her appearance would be a poor example for patients.

The college cannot plausibly argue, however, that Russell was bound unconditionally to accept the decision to exclude her from further participation in the clinical placement program, regardless of how arbitrary or irrational that decision might have been. As a matter of Rhode Island law, "[t]here is no doubt that ordinarily if one exacts a promise from another to perform an act the law implies a counter promise against arbitrary or unreasonable conduct on the part of the promisee." *Psaty & Fuhrman v. Housing Authority*, 68 A.2d 32, 35 (R.I.1949). And, at the very least, the reasonableness of either of the possible lines of thought limned above is open to serious question.[13]

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[13] To the extent that the printed form which Russell completed (under which the clinical coordinator's decision is classified as "final") is material to this issue, the document must be construed strictly, with all doubts resolved against Salve (as the originator of the form). This is true under Rhode Island law, *see Fryzel v. Domestic Credit Corp.*, 385 A.2d 663, 666-67 (R.I.1987); *A.C. Beals Co. v. Rhode Island Hospital*, 292 A.2d 865, 872 (R.I.1972); *Zifcak v. Monroe*, 249 A.2d 893, 896 (R.I.1969), and as a matter of interscholastic jurisprudence, *see e.g., Corso v. Creighton University*, 731 F.2d at 533 (in university-student

(Continued on following page)

In the circumstances at bar, there are competing inferences which can be drawn. There is evidence which, if credited, tends to show that Russell's girth did not reduce her proficiency. The argument that her overweight condition was deleterious to patients as a matter of example rests, at this point, on sheer speculation. Accordingly, the decision to expel Russell, insofar as it prescinds from the Handbook, must be tried to determine whether it was the product of reason or caprice. Summary Judgment would be an inappropriate means of resolving the conflict.

The second morsel in Salve's Count I cupboard is equally unavailing. In a nutshell, the College argues that Russell failed one of the courses prerequisite to completion of her nursing degree, thereby justifying her dismissal and eliminating the need for further inquiry. Yet, there is evidence that the instructor admitted that all of Russell's deficiencies in this course were "directly related" to the claimant's obesity. On this record, a genuine question exists as to whether adiposis was, in Russell's case, a legitimate impediment to due fulfillment of the clinical requirements of the nursing program (as Salve maintains), or whether the College's evaluation was tainted by an unreasonable aversion to obesity or by a desire to expel Russell because she did not conform to the "Salve image."

(Continued from previous page)

relationship where "contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party").

There is considerable evidence in the record attesting to the plaintiff's competence as a student and as a nurse, notwithstanding her one negative evaluation by the defendant Lavin. On August 20, 1985, just one day before Chapdelaine's billet-doux was authored, the plaintiff's supervisor at Hartford Hospital, Patricia Reilly, wrote that she "looked and acted in a very professional manner. Her attendance was excellent and her performance very good. I would be most pleased to hire her as a professional nurse. In fact, I expect to be able to offer her a position for June of 1986." After her dismissal from the College, Russell was promptly admitted to the nursing program at St. Joseph's College (also operated by the Sisters of Mercy). She completed the program there without incident.

While the court is sensitive to the importance of academic freedom and recognizes that deference must be accorded to the reasonable judgment of responsible College officials, the question of reasonableness is in too precarious a balance here to permit summary disposition. Faced with contrary opinions from qualified health care professionals and particularized allegations of personal animosity born of obesophobic obsession, this issue, viewed in the manner most hospitable to the plaintiff's case, survives Fed.R.Civ.P. 56 scrutiny.

The same sort of reasoning applies to the claim that Russell, having signed a document which pledged a weight loss of two pounds per week as a condition of continuing her studies in the College's nursing department, *see* Appendix, was open to ouster for her failure to abide by her written promise. (After all, the Contract itself provided that a failure to achieve the stated goal

would result in "voluntary and immediate withdrawal from the nursing program at Salve Regina College.") But, though it is beyond dispute that the plaintiff did not shed the required poundage, issues of material fact exist as to duress, coercion, and her state of mind, generally, upon the execution of the document. Moreover, as the plaintiff notes, there was no readily ascertainable consideration for her promise. If certain (arguably plausible) inferences are drawn in the manner least favorable to the movant, the weight loss covenant can be seen not as an avenue of defense, but as a product of the invidiously discriminatory course of conduct which the defendants displayed in Russell's case. Finally, the oxymoronic concept of a student essaying a "voluntary withdrawal" against her will, *cf. Chang v. University of Rhode Island*, 606 F.Supp. 1161, 1237 (D.R.I.1985), itself stirs doubts.

In sum, the Contract is at best a useful piece of evidence to assist in constructing the jigsaw of contractual terms, and at worst a piece of paper which is meaningless except as proof of the defendants' malevolence. In any event, it is not dispositive, as a matter of law, of the merits of Count I. It is impossible to apply the standard of "reasonable expectation," *Lyons*, 565 F.2d at 202, to Russell's situation without the aid of precisely the sort of factfinding which battens the Rule 56 hatch. Inasmuch as the viability of Russell's breach of contract claim will depend on the resolution of questions of disputed fact, *brevis* disposition must be withheld on this count.

V. CONCLUSION

The problems presented by this lawsuit are weighty in every sense of the word. The case emphasizes the

uncertain configuration of the boundaries which surround important, but markedly different, values: the necessarily broad freedom which academic administrators must possess in order to operate institutions of higher learning, the rights of a student of tender years to be sheltered from gratuitous debasement or intrusiveness (or worse, from malicious conduct which offends fundamental notions of human decency), the standards of behavior which a university and a undergraduate can reasonably expect from each other. At this relatively early stage of the instant litigation, it remains somewhat unclear as to precisely where on this dimly-lit terrain the College's conduct vis-a-vis Russell falls. So, the illumination of further factfinding seems essential in order to clarify certain of the issues and to map the rights and liabilities of the parties more exactly.

In summary, the court holds that the defendants, and each and all of them, have demonstrated an entitlement to summary judgment in their favor on Counts II, V, VI, VII, and VIII of the complaint. There are, as to these initiatives, no genuine questions of material fact. For the reasons stated, the defendants deserve to prevail thereon as a matter of law. Conversely, the motion for summary judgment must be denied as to Counts I, III, and IV of the complaint. Russell has shown enough steel to put the defendants (or some of them, *see ante* nn. 9, 11) to their mettle on these claims.

The motion for summary judgment is *granted in part and denied in part*, as outlined above. As to those counts upon which the defendants have prevailed, entry of final judgment shall be withheld pending disposition of the

remaining claims. Fed. R. Civ.P. 54(b). *See Bank of New York v. Hoyt*, 108 F.R.D. 184, 186-87 (D.R.I.1985).

It is so ordered.

APPENDIX

CONTRACT

I, Sharon Russell, agree to the following conditions for continuing in Nursing 312 during the Spring 1985 Semester. I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the Nursing Program at Salve Regina College thus making me ineligible for Nursing 411.

1. Maintain a minimum weight loss of 2 pounds per week effective immediately.
2. Report to Mrs. Chapdelaine or Faculty Secretary weekly (every Friday morning) with evidence of progress in weight loss program. This will commence January 25, 1985.

   NB – Report January 22nd for first accounting after the holiday.
3. Maintain academic standing as required.

Additionally, I will be aware of all requirements listed in the Nursing Department Handbook, 1983-85 Edition.

/s/ Sharon Russell
Sharon Russell
Dec. 18, 1984
Date
/s/ Catherine E. Graziano, RN
Witness

JOINT STATEMENT FILED FEBRUARY 13, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL	:	
	:	C.A. No. 85-0628 S
v.	:	
SALVE REGINA COLLEGE et al	:	

JOINT STATEMENT

Now come the parties in the above-captioned action, and in accordance with paragraphs 4 and 5 of the Court's jury pre-trial order hereby make the following joint statement.

1. Trial counsel for each party shall be the following individuals:

   (a) Donald J. Packer for Plaintiff; and

   (b) Steven E. Snow for all Defendants.

2. The following is a concise summary of the respective positions asserted by each of the parties as to all issues:

In accordance with the Court's opinion and order dated November 17, 1986, summary judgment has entered for defendants with respect to several causes of action (Counts II, V, VI, VII, and VIII) set forth in plaintiff's complaint. Accordingly, three claims (Count I, breach of contract; Count III, intentional infliction of emotional distress; and Count IV, invasion of privacy) remain for trial by jury. With respect to these remaining claims, plaintiff contends that Salve Regina College breached its contract with plaintiff by refusing to permit her to continue in the Clinical Nursing Program during

her senior year at the College. Plaintiff contends, in this regard, that she had a contract with the College the import of which was that if she maintained her grades and academic standing, paid her tuition, was not a disciplinary problem, and otherwise complied with the rules and regulations of the College and its Nursing Program, she would be allowed to continue her nursing education at the College and receive her nursing degree therefrom. Plaintiff asserts that she complied with these terms and conditions, but that the College breached the contract by arbitrarily and capriciously declaring plaintiff to be ineligible for the senior year clinical year program.

Plaintiff alleges further that the College and the individual defendants engaged in a systematic and calculated pattern of torment, ridicule and harassment of plaintiff because of her weight, and that such course of conduct amounted to an intentional infliction of emotional distress. Finally, plaintiff contends that the course of conduct in which defendants allegedly engaged constituted an unwarranted and unjustified intrusion upon plaintiff's asserted right of privacy.

The College contends that it did not breach the contract between the parties, as such contract is contained in the "reasonable expectations" of plaintiff and the College. The College posits that evidence of such reasonable expectations may be found in the Nursing Department handbook, in the weight loss agreement executed by plaintiff, and in the course of dealings between the parties. Consideration of these factors, the College asserts, reveals that the College had authority, for health reasons, to exclude plaintiff from the clinical component of the

Nursing Program; that plaintiff had not satisfactorily performed the Junior year clinical nursing program for reasons relating primarily to her obesity, resulting in plaintiff's agreement to lose weight as a condition of continued enrollment; and that defendant had failed to live up to her weight loss agreement, resulting in her ineligibility to continue in the clinical portion of the nursing curriculum. Consequently, the College contends that the plaintiff had no reasonable expectation of continued enrollment in the clinical component of the Nursing Program.

Defendants deny further that they have intentionally inflicted emotional distress upon or invaded the plaintiff's privacy. Defendants did not torment, ridicule or harass the plaintiff because of her obesity. Rather, defendants assert that their conduct was motivated by concern for plaintiff's well-being, and that defendants' conduct was not outrageous in the ordinary course of human relations. Moreover, defendants dispute that they infringed upon any legitimate expectation of privacy of plaintiff.

3. The following constitutes a listing of all facts established by the pleadings, or by stipulations and/or admissions, and/or not otherwise in genuine dispute:

(a) The plaintiff, Sharon L. Russell, is a resident of East Hartford, Connecticut.

(b) Salve Regina College is a religiously affiliated school of higher education incorporated in the state of Rhode Island. The College is sponsored by The Sisters of Mercy.

(c) In the Fall of 1981, Sharon Russell applied to Salve Regina College as a liberal arts student. She was given a personal interview and was accepted for admission by early decision in December, 1981.

(d) Prior to matriculating as a student in the Fall of 1982, plaintiff filed a health form with the College indicating that her height was 5 feet 6 inches and her weight was 280 pounds. She also indicated that she had a history of menstrual abnormalities and hypoglycemia.

(e) Russell still suffers from hypoglycemia and has been treated medically for the problem. Russell's physician has told her that her hypoglycemia may be related to her weight.

(f) Prior to matriculating as a Freshman, Russell's blood pressure was measured at 150/78. Her pulse rate was 108.

(g) Prior to matriculating as a Freshman, Russell was counselled by her physician with respect to her obesity. Her physician suggested to her that she lose weight, and she was told she was obese.

(h) During her Freshman year, Russell went to the College's health service because she wanted to lose weight. On November 30, 1982, when she first went to the health service, she weighed 307 1/4 pounds. On December 6, 1982, her recorded weight at the health center was 306 pounds. Russell's recorded weight at the College's health services was 315 pounds on January 25, 1983. That was the last time she went to the health services asking to be weighed.

(i) In April, 1983, Russell applied for and was granted admission as a candidate to the Nursing Program at the College. Russell understood that to be a candidate meant that one had to fulfill the requirements stated in the Nursing Handbook, a copy of which was given to her.

(j) On the first day of her entry into the Nursing Program, Ms. Russell's advisor, Mrs. Barbara Dean, asked to speak to her. Mrs. Dean told Ms. Russell that "I am concerned about your weight," and "You know Sharon, I just don't know if we are going to get a uniform to fit you." Russell was aware of the requirement of the Nursing Program that all students in the clinical area have a school uniform. Dean also told Russell that she would have to do something about her weight. Mrs. Dean told Sharon Russell that she was concerned about her weight for health reasons.

(k) After her conversation with Mrs. Dean, Ms. Russell spoke to defendant Lavin and told her that she wanted to switch advisors. She felt that Mrs. Dean was picking on her. Russell asked Ms. Lavin to become her advisor and Lavin agreed. Lavin also told Russell that she was perceiving the situation incorrectly and mentioned that losing weight would be beneficial for Russell's health in her opinion. Russell agreed with Lavin that it would be a good idea for her to lose weight. Mrs. Lavin also told Russell that it was important for Russell to think about her weight in terms of the health care profession. There was some discussion concerning a nurse's position as a

role model, and Lavin explained her own experiences of needing to lose weight.

(l) Mrs. Dean's only other discussion with Russell concerning her weight was an occasional inquiry as to how her diet was progressing. Russell felt it was none of Mrs. Dean's business.

(m) In the beginning, Russell perceived Lavin's role in encouraging her to lose weight as supportive.

(n) Russell did not lose weight during her Sophomore year, the first year in the nursing curriculum.

(o) During the second semester of Russell's Sophomore year, Sister Maureen Hynes was Russell's nursing laboratory instructor. The relationship was "going fine" until something happened and Russell got upset. Sister Maureen demonstrated taking blood pressure using Ms. Russell as a model because Ms. Russell's partner was having difficulty getting the correct reading from her. Russell did not think it was inappropriate for Sister Maureen to have done this because the partner was Russell's friend. Sister Maureen talked to Russell concerning her weight and talked about the health problems and health risks associated with obesity.

(p) All defendants told Russell about the health risks associated with obesity. Russell does not deny that there are health risks associated with obesity.

(q) Russell perceived Sister Maureen Hynes' role as giving her information.

(r) In the Spring of 1984, Russell ordered a school uniform in size 48. At or about that time, Ms. Joan Chapdelaine discussed clinical health requirements with the Sophomore class, including Sharon Russell. Mrs. Chapdelaine was in charge of the clinical placements for Junior and Senior students. Mrs. Chapdelaine talked about health requirements of the program and asked all students to sign a clinical health policy form. The form signed by Sharon Russell on April 12, 1984, states:

> I agree to inform the Nursing Department Chairman and the Clinical Agency Coordinator of any health problems I am currently experiencing or have been treated for recently (including the vacation period) as well as of any medication I am taking. In addition, I will provide documentation from my medical source regarding that condition, my treatment and my limitations. I will accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not I can function in the clinical area. Whenever necessary, the Department Chairman and Clinical Agency Coordinator will have access to the medical records maintained by the College health services.

(s) At or about the same time, Mrs. Chapdelaine passed out a form to the Sophomore class, including Sharon Russell, that asked for particular health information including height and weight. Sharon provided the information to the Clinical

Agency Coordinator which indicated that her height was 5 feet 7 inches and her weight was 270 pounds.

(t) A few days later, in May, 1984, all Sophomore nursing students were weighed and measured by the Clinical Agency Coordinator, Mrs. Chapdelaine. Russell's weight was 328 pounds, 58 more pounds than Russell had indicated on her health form.

(u) In May, 1984, Russell promised Mrs. Chapdelaine that she would try to lose weight.

(v) In the Spring of her Sophomore year, Sharon Russell took a required cardiopulmonary resuscitation ("CPR") course at Salve Regina College. The CPR certificate was a prerequisite to entering the clinical aspects of the Nursing Program. The instructor was Ms. Patricia Murphy. Sharon Russell never completed the course at Salve. Russell later retook the course at the Newport Red Cross and passed.

(w) In August, 1984, Russell was accepted into full status in the Nursing Program. At that time, she received a note from Mrs. Graziano, Chairperson of the Department of Nursing. Russell had made promises to members of the nursing faculty that she would try to lose weight.

(x) Sharon Russell had an opportunity to read the Nursing Handbook before she accepted admittance into full status in the Nursing Department. Russell was aware of the College's philosophy that students should grow to become their

best selves, and was aware that this requirement applied to her professionally as well as personally. Russell was also aware that the handbook stated that Clinical Agency Coordinator and the Department Chairperson reserved the right to make the determination as to whether a student met the health requirements and was able to enter into the clinical program.

(y) When Russell began her Junior year in September, 1984, she had to reorder a larger uniform, size 52.

(z) Mrs. Lavin was Sharon Russell's clinical instructor during the Fall semester, 1984. At that time, Russell felt that Mrs. Lavin was being helpful and supportive with respect to her need to lose weight. Early that semester, there was a problem at St. Luke's Hospital, where Russell was assigned for clinical training, because she was unable to fit into the extra-large sterile scrub gowns provided by the hospital. The hospital made a temporary exception which permitted Russell to wear a sterile doctor's gown (open in the back) as long as she was trying to obtain a proper gown. Russell was not able to conform with sterile scrub procedure because she could not lift the sleeves of the doctor's gown over her arm to her elbows. Proper sterile procedure in the Delivery Room mandated scrubbing to the elbows. Mrs. Lavin said she was sorry that the problem had arisen and assisted Russell in procuring a proper gown.

(aa) Obesity and obesity-related health problems were subjects in Russell's nursing

curriculum. Russell understood the risks of cardiovascular problems, diabetes, muscular joint problems, and other risks and health problems associated with obesity.

(bb) During her Junior year in clinical classes, Russell openly discussed her attempts to lose weight. Russell felt that she could control her own eating and that she was determined to control her own eating and lose weight. In order to lose weight, Russell realized that she had to change her eating pattern. In October, 1984, Mrs. Lavin suggested that Russell speak with Dr. Joan Mullaney concerning weight loss and behavior modification. Russell had a number of conversations during the Fall, 1984 semester with Mrs. Lavin concerning her weight. Lavin expressed concern to Russell about Russell's failure to internalize health information she was receiving in class.

(cc) After her meeting with Dr. Mullaney, Russell complained to Mrs. Graziano, the Chairman of the Nursing Department, claiming that she had been verbally abused by Dr. Mullaney. That was on or about October 17, 1984. Mrs. Graziano told her that she was not perceiving the situation correctly. Mrs. Graziano said that she perceived that Dr. Mullaney was there to give Russell instructions on diet and behavior modification and that Dr. Mullaney was there to help Russell. After that meeting, Russell wrote an unsolicited letter to Mrs. Graziano.

(dd) When Russell started Weight Watchers (late October 1984) she weighed 335

pounds, 7 pounds more than when Mrs. Chapdelaine weighed her in May, 1984.

(ee) On December 18, 1984, Sharon Russell had her final clinical evaluations with Mrs. Lavin. Sharon Russell signed a document dated December 18, 1984. She was not threatened with physical harm if she did not sign the document. She was told, however, that if she did not sign the document, she would not be permitted to enter Nursing 312.

(ff) After December 18, 1984, Sharon Russell had no contact with any of the individual defendants other than Mrs. Chapdelaine. Russell first met with Mrs. Chapdelaine pursuant to the December 18 document, in January, 1985. Thereafter, Russell met almost weekly with Mrs. Chapdelaine and Russell regularly showed Mrs. Chapdelaine her Weight Watchers' booklet. Mrs. Chapdelaine maintained a piece of paper in her desk with Russell's weekly weight taken from the Weight Watchers' booklet. On January 20, 1985, when Russell first met with Mrs. Chapdelaine, she weighed 317 pounds. The last time that Russell shared her Weight Watchers booklet with Mrs. Chapdelaine, May 10, 1985, Russell weighed 300.5.

(gg) Russell agreed with Sister Sheila Megley that Russell would meet with Mrs. Chapdelaine over the Summer of 1985 for Mrs. Chapdelaine to continue monitoring Sharon's weight loss. Russell told Sister Sheila that Mrs. Chapdelaine was being supportive of her at times.

(hh) Russell agreed with Mrs. Chapdelaine to meet with her during the summer in order to monitor Russell's weight loss.

(ii) Russell had not told her parents that she had signed the December 18, 1984 document.

(jj) In April, 1985, clinical postings for Nursing 411 were posted with Sharon being on the list.

(kk) Russell did not contact Mrs. Chapdelaine in June, 1985. When Russell last was weighed at Weight Watchers (June 16), she weighed 303.5 pounds. On or about June 26, 1985, Mrs. Chapdelaine called Russell. Russell told Chapdelaine that her weight was now 297. On or about July 18, 1985, Russell wrote to Mrs. Chapdelaine indicating that she had lost about 5 pounds. Her weight recorded at Weight Watchers at that time was 306.5 pounds.

(ll) On or about July 25, 1985, Mrs. Chapdelaine met with Sharon Russell and her mother. Mrs. Chapdelaine informed Russell that it did not look good for her eligibility for Nursing 411 since she had not fulfilled the weight loss goals of the document dated December 18, 1984. Mrs. Chapdelaine told Russell that she was disappointed that Russell had not met with her during the Summer as she had agreed. Chapdelaine said she was very concerned about Russell's lack of progress on her diet. Chapdelaine said that it did not appear that Russell could fulfill the conditions of the "contract".

(mm) On or about August 21, 1985, Mrs. Chapdelaine called Sharon Russell. Russell

told Mrs. Chapdelaine that her weight loss was about the same. Mrs. Chapdelaine said that, under the circumstances, Russell's name was being removed from the list of those eligible to enter Nursing 411.

(nn) None of the defendants said that Russell was a disgrace to Salve Regina College.

4. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 (a) inasmuch as this action is between citizens of different states and the matter in controversy allegedly exceeds the sum or value of $10,000, exclusive of interest and costs. The Court has personal jurisdiction over all of the defendants herein inasmuch as at all times material to this action, they were residents of the forum state. Venue in this action is proper in the United States District Court for the District of Rhode Island pursuant to 28 U.S.C. § 1391 (b) inasmuch as all defendants reside in said judicial district and because the claim arose in said judicial district.

5. The following is a listing of the contested issues of fact:

(a) What constitute the terms and conditions of the implied contractual relationship between the College and plaintiff, and what were plaintiff's reasonable expectations, as manifested by the relationship between the College and plaintiff?

(b) Whether the College breached the terms and conditions of the implied contract between the parties?

(c) Whether plaintiff's execution of the December 18, 1984 document was the result of an exercise of free will or as a result of duress or coercion?

(d) Whether the conduct of defendants, in dealing with plaintiff concerning her obesity, constituted an intentional infliction of emotional dis'ress?

(e) Whether the conduct of defendants, in dealing with plaintiff concerning her obesity, constituted an invasion of plaintiff's asserted right of privacy? and

(f) Whether plaintiff had sustained damages as a result of defendants' alleged wrongful actions? To the full extent currently ascertainable, plaintiff seeks the following damages:

		(payments lost)
$	2,775.00	Tuition paid to Salve for Senior Year (not returned)
$	275.00	Deposit on Newport apartment for senior year (forfeited)
$	35.00	Salve uniform
$	185.89	Salve class ring
		(additional expenses incurred)
$	2,760.00	St. Joseph's tuition (Fall '86)
$	1,318.00	St. Joseph's tuition (Spring '86)
$	945.00	St. Joseph's tuition (Summer '86)
$	6,000.00	Room and board
$	240.00	Parking
$	20.00	St. Joseph's insurance fee
$	10.00	St. Joseph's nursing convention fee
$	80.00	St. Joseph's uniforms
$	350.00	Books
		(medical expenses)
$	700.00	Dr. Klier
$	250.00	Dr. Yordan
$	1,700.00	Dr. Trowbridge – Hartford Hospital
$	200.00	Medications
$	700.00	Anesthesiologist

		(lost wages and benefits)
$	25,000.00	one year plus value of one year's lost time
		in career experience (not capable of specific valuation)
		(pain and suffering)
		A value not capable of specific valuation which Plaintiff feels is to be determined by the jury.
		(Attorneys Fees)
		As provided for under R.I. Gen. Laws § 9-1-28.1

6. The following constitutes a listing of all contested issues of law:

(a) Whether the College breached an implied contract with defendant in withdrawing her eligibility to participate in the Senior year clinical component of the nursing curriculum? Rhode Island law is applicable to this issue;

(b) Whether defendants' conduct constituted the intentional infliction of emotional distress upon plaintiff? Rhode Island law is applicable to this issue; and

(c) Whether defendants' conduct constituted an invasion of plaintiff's privacy? Rhode Island law is applicable to this issue.

7. There are no motions currently pending before the Court. However, defendants contemplate that they may file a motion in limine in order to preclude testimony from plaintiff's medical experts unless plaintiff responds to discovery requests directed from defendants to plaintiff in May, 1986. There are no other special issues

that would be appropriate for determination in advance of trial on the merits.

8. Counsel believe that there are no further matters that would aid in the disposition of this action. Despite diligent good-faith settlement efforts, it appears that this action cannot be settled. Each party has made diligent good-faith efforts (a) to avoid unnecessary, cumulative or duplicative proof; (b) to enter into appropriate fact stipulations and/or stipulations as to the authenticity of documents; and (c) to narrow and simplify the issues, and to obtain admissions of fact and of documents in the interests of eliminating needless taking of evidence.

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CA. No. 85-0628L

SHARON L. RUSSELL

V.

SALVE REGINA COLLEGE, ET AL

Before The Honorable Ronald R. Lagueux, District Judge

[86]

11 APRIL 1989

THE COURT: The matter before the Court is the motion of all defendants for a directed verdict on the three remaining counts in this complaint. Count I is a claim for breach of contract against Salve Regina College. Count III is a claim for intentional infliction of emotional distress against the college and five individuals, and Count IV is a claim of invasion of privacy against the college and five individuals. The five individuals are Catherine L. Graziano, who was the Director of the Salve Regina Nursing Department; Joan Chapdelaine, who was a faculty member and clinical agency co-ordinator for the Nursing Department; Mary Lavin, who was a faculty member; Sister Maureen Hynes who was a faculty member; and Barbara Dean who was a faculty member.

In deciding a motion for directed verdict, I have to view the evidence in the light most favorable to the plaintiff, and draw all reasonable inferences in favor or the plaintiff.

First, let me deal with the Count III claim of intentional infliction of emotional distress. This is a cause of action which is recognized under Rhode Island law. It's of

recent vintage. It arose in the ?"Champlin case where, incidentally, the plaintiff recovered in the action below, tried in Washington County before Judge Cochrane, and the Supreme Court reversed. And in the Rhode Island Supreme Court decision it was pointed out that the cause of action requires outrageous conduct, and that from this outrageous [87] conduct, severe emotional distress must result, and also there must be physical symptomology. The Supreme Court of Rhode Island discussed this cause of action in Elias v. Youngnen, which was, I believe, an employee/employer relationship. The "Champlin case involved a creditor/debtor relationship.

I've had one other occasion to deal with this subject in a case that I tried a couple of years ago on this court involving an employer/employee relationship.

Now the relationship here was that of teacher and pupil, with regard to the various individuals. There must necessarily be a good deal of latitude in a teacher's dealings with a student. Not every sharp retort or verbal thrust against a student should give rise to this cause of action in the courts. We're not even far removed from the days of corporal punishment in the classroom. The function of a teacher in sometimes making unkind remarks towards a student may be to make the student achieve. There must be a great deal of latitude in what can be said by a teacher to a pupil.

In this case, the few instances that the plaintiff complains about during the course of her metriculation at Salve Regina, hardly fit the characterization of outrageous. There was no outrageous conduct, even past the threshold to even get this issue to the jury.

Also, there was no severe emotional distress based on the view of the evidence that I take, and that is viewing it in the [88] light most favorable to the plaintiff.

So there are no factual issues to be decided here by the jury on that count. I'm satisfied as a matter of law that the plaintiff has not presented a case which even can go to the jury on the question of whether all of these defendants intentionally caused her emotional distress. This case falls far short of even a borderline case. Therefore, I direct a verdict for all six defendants, the college and the five individuals on Count III, on the claim for intentional infliction of emotional distress.

Count IV is a claim of invasion of privacy. Frankly, I don't see what invasion of privacy has to do with this case. The only two prongs of the statute which might apply, or which are claimed to apply is the invasion of the plaintiff's solitude, and there was no invasion of solitude in this case. The fact of her weight was an issue, and a legitimate issue, to be discussed with her by the faculty members at Salve Regina College, and it was discussed with her in the light of the requirements of the program at that particular college, in creating nurses who would go to the outside world and be representatives of Salve Regina College. There was no invasion of her solitude, certainly. The discussion of this subject was done in the setting of her education, and there was no publication of private facts to the outside world. It was a matter that was discussed in-house, and was a matter of legitimate discussion and concern, and the Rhode Island statute on invasion of privacy is simply not implicated in this case. Therefore, I [89] grant the motion for directed verdict on

behalf of all six defendants, the college and the five individuals.

That leaves, finally, the first count, which is what this case is really all about, anyway, and that is breach of contract. That count is against the college. I've never had occasion in the past to deal with the contractual relationship between a student and a college. I did some years ago as a Superior Court Judge have some very interesting litigation involving a contractual relationship between a professor and a college, and the Supreme Court and I had some disagreement. They forced me to decide the case twice. For the interested, the case is called Drans v. Providence College. It involved the question of tenure, and mandatory retirement.

It is clear that the Rhode Island Supreme Court has a vision of the law that indicates that there's something more than a contractual relationship involved when you're dealing with a college or an institution of higher learning, and in the Drans case, they gave an indication that there was sort of a common law of academia which I never quite understood. I can understand it to some degree, because for example, in the student college relationship, although it is based on contract, there is not a nice neat contract to look at to determine what the rights and obligations are on both sides. There's a college handbook and there's a catalog, and there are a lot of other things that are really incorporated into the contractual relationship, and [90] precisely what the parameters are of the contract are sometimes difficult to determine in a particular case. So there is some embellishment in the law to the basic contractual relationship.

Not only are there express contract facets of a relationship, there are also implied contract facets of the relationship, because not everything is on paper. There is no question that this plaintiff as a student at Salve Regina College had a contractual relationship with Salve Regina College at the time she was dismissed, and I will call it a dismissal because that's what it was, no matter what other polite language might be used.

The basic question is whether Salve Regina College was justified in dismissing this plaintiff after completion of three years, and not allowing her to enter her fourth year, and final year, of the nursing program, towards a degree.

The thrust of the discussion in this case to this point has been the so-called contract of December 18, 1984, but that contract, as it is called, must be viewed in a larger light. I have no difficulty in determining that there was no legal duress involved at the time when the plaintiff was in a room with Mrs. Graziano and Mrs. Lavin. She was between a rock and a hard place, but it's a kind of a position we all find ourselves in during life where we have to make some tough decisions, and some rather quick decisions about our life, and where we're going. She was about to be flunked out. Mrs. Lavin had made a determination, subjective as it was, that the plaintiff did not measure up in her surgical, [91] medical, clinical course, and it was weight related. This is not the type of a course where one gives 90s or 70s or number grades. This was an entirely subjective evaluation which the plaintiff would be receiving, and which, in effect, put her at the mercy of her teachers. There have been a lot of students

over the years, in a lot of colleges, who've had disagreements with their teachers about such matters. Probably everyone in this room has had some disagreement with a mentor over the level of a grade, or whether the grade was satisfactory or unsatisfactory.

The fact of the matter was, the plaintiff had a choice at that point. She could have insisted on her rights and said I will not sign such an agreement, I don't think my weight has anything to do with my performance, and if you flunk me out, I'll see you in court. On the other hand, she had the choice of getting a satisfactory grade because Mrs. Graziano and Mrs. Lavin thought that she deserved another chance if she would conscientiously attempt to lose weight. Getting someone to make that commitment on paper is a useful tool.

The plaintiff made that choice. She signed that document, and she exhibited a conscientious desire to abide by the terms of that limited document. By her own testimony, it is clear that she started going to Weight Watchers, keeping her booklet, keeping in touch with Mrs. Chapdelaine who was chosen as the weight referee, so to speak, at this point. So that that contract, so-called, became part of the overall contractual relationship between the [92] parties, although it was only one portion of the overall relationship.

So, although I'm satisfied that there was no duress in the legal sense, which would vitiate the approval which she gave, I see this case in a larger scope than the parties have been seeing it.

In short, I think there is a legitimate question for the jury to decide as to whether the dismissal of the plaintiff

in August of 1985 by Mrs. Chapdelaine, was reasonable and justified, in view of the whole contractual relationship between the college and this plaintiff. In other words, it creates an issue of substantial performance. Neither side has mentioned that phrase in this case, but it is a very important one. It is a very important doctrine in the law of the State of Rhode Island. If the jury can say that the plaintiff substantially performed her contractual obligations to the college, then they can say that she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under this side agreement, then the jury can determine that the college justifiably dismissed her from the program.

Neither side has talked about substantial performance to this point, but I would expect that they would give me some requests for instructions at the appropriate time on that subject. I will tell you now that I've charged a jury on that subject before, and [93] there's a good deal of Rhode Island law. As a matter of fact, one of the cases that I tried, probably is a Rhode Island Supreme Court decision in this area, and there's the Restatement of Contracts, also.

So it seems to me we have a legitimate factual issue for the jury to determine. The ultimate fact of whether there was substantial performance by the plaintiff in her overall contractual relationship at Salve Regina seems to me, under these circumstances, is an issue to be determined by the jury, and therefore, I deny the defendant Salve Regina's motion for directed verdict on Count I, and that remains the only issue in this case.

It's late in the afternoon, do you want to start your case tomorrow morning?

MR. SNOW: I'd prefer that, tomorrow morning, yes, your Honor.

THE COURT: All right. We can let the jurors go. Tomorrow morning we can start at 10 o'clock. 10 o'clock tomorrow morning.

(Court adjourned)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 85-0628 L

SHARON L. RUSSELL

v.

SALVE REGINA COLLEGE ET AL

Before the Honorable Ronald R. Lagueux
District Judge
April 14, 1989

[13] THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine whether the Supreme Court of Rhode Island if faced with this case would decide whether the doctrine of substantial performance would apply. I recognize that the Rhode Island cases on this subject are largely cases involving construction contracts. The very first case that I recall is Pelletier v. Massey, which is in 49 R.I. 408. That was decided in 1928, and in that case, the Supreme Court of Rhode Island pointed out that in the context of a construction contract, that a contractor would be entitled to an installment payment if it had substantially performed the contract, and the Court in that case, especially pointed out that the trial judge had properly charged the jury in accordance with the doctrine of substantial [14] performance, which was an accepted rule. The Court also stated that whether there was substantial performance or

not was a question of fact to be decided by the jury. There is a more recent case, I believe it's the Ferris case, which also comes up in a construction contract milieu.

Now, I have an advantage that the Court of Appeals doesn't have, and that is I was a state trial judge for 18 and ½ years, and I have a feel for what the Rhode Island Supreme Court will do or won't do. As a matter of fact, I charged at least two juries on the issue of substantial performance in other than construction contract situations, and I am satisfied in my own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for.

So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine [15] of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury.

The defendant also claims that the plaintiff hasn't proved damages. There is ample evidence in the record

from which the jury could determine damages. The measure of damages in this case is a year in the life. That's what the plaintiff was deprived of, a year of her professional life, and therefore, she lost the income she would have made during that year, and she incurred additional expenses for another year of college, because she had to repeat her junior year. So I will charge the jury along that line. And the evidence is quite clear she lost roughly $25,000 in income, because she had to repeat her junior year at St. Joseph's and she lost whatever it was, $3,000 that she had to pay, extra tuition that she had to pay, and other fees, to get that extra year. In other words, if she had gotten the benefit of her bargain, if the jury finds that the college was in breach of contract, the jury will find that the benefit of her bargain was that she would have had a degree in one more year from Salve Regina in nursing, and wouldn't have had to pay for an extra year of schooling, and would have had one year of income. So there is ample evidence from which the jury can determine damages in this case under the benefit of the bargain rule.

For all those reasons, defendant's motion for directed verdict is denied.

JURY INSTRUCTIONS

[81] 14 APRIL 1989

AFTERNOON SESSION

(Jury present)

THE COURT: Good afternoon, everyone. The record will indicate the jurors are all present.

Madam Clerk, would you distribute the verdict sheet, one to the forelady and one to each counsel table and one for yourself.

Madam Forelady and members of the jury, it is now my obligation to instruct you on the law applicable to this case. You will determine the facts then apply the facts to the law as I give it to you, and thereby arrive at your verdict.

You have now heard all the evidence in the case and you have heard the final arguments of the lawyers as well. My duty is to instruct you on points of law. It is your duty to accept these instructions of law and apply them to the facts as you determine the facts to be. As to legal matters, you must take the law as I present it to you. If a lawyer has stated any legal principle during the course of the trial or in argument that is different from anything that I state the law is, of course, you are to follow my instructions. You should not single out any one instruction as stating the law, but you should consider my instructions as a whole when you retire to deliberate.

You should not allow yourselves to be concerned about the wisdom of any rule of law that I state, regardless of any opinion that you may have about the law, or

what it should be. It would [82] violate your sworn duty to base a verdict upon any other view of the law than that which I give you in these instructions.

In this case, the plaintiff is an individual. The defendant is a corporation. The defendant is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide this case using the same impartiality that you'd use in deciding a case between two individuals.

Since the defendant is a corporation, and thus a legal entity, it cannot act except through its officers, agents and employees. Therefore, when I refer to any acts of the defendant in these instructions, I'm referring to the acts of the defendant Salve Regina college through its officers, agents and employees.

Now this is a breach of contract action. The plaintiff's claim and only claim at this point is that she was wrongfully dismissed on April 21, 1985 from the nursing program at Salve Regina College, and that constituted a breach of her contract with the college, and she seeks to recover damages for that alleged breach of contract.

It is necessary that you understand what a contract is, and I will speak about a contract generally. A contract is an agreement between two sides, two parties. Each side promises to do something or to refrain from doing something, and that's what gives a contract what we call in the law consideration, and makes it a valid and binding agreement between the parties, and the [83] parties are required under the law to observe the terms of the contract.

In this particular situation, there is a contractual relationship created when a student is accepted and becomes a full metriculating student at a college. It is a contract between the student and the college. It is not a simple contract to determine the terms because there are so many elements to the contract. In most commercial situations, when there is a written contract, all the terms of the contract are in the writing, and both sides sign it, and then people can look to that document and read it to see what the obligations are. Of course, in the relationship between student and school, there are a number of elements to the contract. Those elements are found in diverse areas. There are student handbooks, there are catalogs, there are written policies of the college, and there are oral understandings between the student and some of the faculty or other employees of the college that all come to form part of the contractual agreement between the student and the college.

Essentially, what the student promises to do is to observe all the rules and regulations and policies of the college, and maintain a satisfactory academic standing as required by the college, and pay all fees of the college. On the other side, the college agrees to educate that student and ultimately in a major field of study, and ultimately grant a degree to that student.

It is clear in this case that there was such an agreement [84] between the plaintiff Sharon Russell and Salve Regina College that extended over some period of time.

This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit

Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties.

Whatever view you take of the evidence, it is clear that Sharon Russell was in danger of receiving an unsatisfactory grade in her clinical course taken that fall, the medical and surgical clinical course, whose teacher was Mary Lavin. Rather than have her get an unsatisfactory in that course, it was determined by both sides that she would receive a satisfactory grade if she made the agreements contained in that written contract. The contract was signed by the plaintiff and obviously agreed to by the college through Dean Graziano, and that became a binding contract as part of the overall contractual relationship between Sharon Russell and Salve Regina College.

It is clear and undisputed that on August 21, 1985, Sharon Russell was dismissed from the nursing program because the college through its agents, Graziano and Chapdelaine, asserted that Sharon Russell had not complied with the terms of the contract.

So bringing this case down to its very simplest terms, in order for the plaintiff to recover in this case, the plaintiff must prove to you by a fair preponderance of the evidence that on [85] August 21, 1985, she was wrongfully dismissed from the nursing program.

In order to prove that she was wrongfully dismissed from the nursing program at that time, she has to prove that she performed her obligation, and all obligations, actually, under the contract that she had, with the college, the whole contract. There is no dispute in this case that

she performed adequately, academically, and to that point she had a passing grade in everything, had maintained the point average that was required, that she had complied with all the rules and regulations and policies of the college, and therefore, the case comes down to the point of whether she had complied with this special agreement of December 18, 1984.

The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

Whether there has been substantial performance of a contract in any particular circumstance is a question of fact for you, the jury, to determine.

[86] To aid you in arriving at that determination of fact in this case, there are certain factors that the law states you can consider in arriving at your determination. First of all, you can consider the extent to which the col'ege will be deprived of any benefit which it could reasonably have expected in this contractual relationship.

Secondly, you can consider the extent to which the defendant college can be adequately compensated in some way for the part of the benefit which it will not receive because of the failure of the plaintiff to comply fully.

Thirdly, you can consider the extent to which the plaintiff will suffer a forfeiture of rights or other benefits if you do not find substantial compliance.

Next, you may consider the likelihood that the plaintiff will cure her failure to perform fully, taking account of all the circumstances, including any reasonable assurances given by the plaintiff.

Next, you may consider the extent to which the behavior of the plaintiff comports with standards of good faith and fair dealing.

And, finally, you can consider whether the plaintiff's failure to fully perform was a willful act or not. Considering all these factors, you can make a determination, and must ultimately make a determination, of whether the plaintiff has substantially complied and performed her contractual obligations [87] to the college, and had substantially performed her contractual obligations to the college on August 21, 1985, when she was dismissed from the nursing program.

If you find that she has substantially, or had substantially performed her contractual obligations to the college at that time, then you must necessarily conclude that the college wrongfully dismissed her from the nursing program.

If you find that the plaintiff had not substantially performed her contractual obligations to the college at that time, then necessarily you must find that the college properly and rightfully exercising its rights dismissed her from the nursing program. That's what this case is all about.

Now, in cases of this kind, as I've already said to you, the law places the burden of proof upon the plaintiff. That means simply that the law imposes upon the plaintiff the obligation of proving that which she asserts or claims. In other words, speaking generally, the person who advances a proposition has the burden of sustaining its validity.

The law further requires that the plaintiff prove that which she asserts or claims by a fair preponderance of the evidence. Where evidence adduced either for or against a given proposition outweighs contrary evidence, such evidence is said to preponderate. Therefore, proof by a fair preponderance of the evidence means proof by the greater weight of the evidence.

So when I say to you here that the plaintiff has the burden [88] of proof on any proposition by a fair preponderance of the evidence, I mean simply this, I mean you must be persuaded, considering all the evidence in the case, that the proposition on which the plaintiff has the burden of proof is more probably true than not.

So bringing this case then down to its very simplest terms, ladies and gentleman, in order for the plaintiff to recover in this case, she must have shown you through the evidence that it is more probably than not that she has substantially complied with all her contractual obligations to the college, and that therefore her dismissal from the nursing program on August 21, 1985, was a breach of contract by the college.

Now in order for you to reach a decision in this case, it is necessary that you first determine the facts. You have to determine from all of the evidence put before you

which of the contentions of the adversary parties are true. It is the function of the jury to consider the evidence and to decide from that evidence what the true facts are in the case. It's my duty to decide questions of law and to instruct you on the law, but it's for you to determine the facts and then apply the facts to the law as I have given it to you.

Therefore, the factual situation in this case, what actually happened, took place or transpired between the parties from time to time, is for you to determine, and you alone. It is your recollection and your understanding of the testimony and exhibits [89] that controls, not what the Court or counsel might have said about that testimony and evidence.

It is understood, however, that in determining the facts, you can consider only that evidence properly put before you. If I have kept evidence out by sustaining an objection or granting a motion to strike, that evidence is not before you for your consideration.

If I have allowed evidence in, even over objection, that evidence is before you for your consideration.

Any exhibits that have been marked as full exhibits in this case are full evidence before you and will be available to you in the juryroom for your consideration during deliberations.

Bear in mind that any remarks or statements made by counsel in your presence during the course of trial, or in argument, are not evidence, and should not be considered as such by you during the course of your deliberations.

Now, facts can be proved to you by two types of evidence. One type of evidence we call direct evidence. The second type we call circumstantial evidence. Direct evidence is sometimes referred to as eyewitness evidence because that's the most common type of direct evidence. When a witness testifies to you that that witness saw something, smelled something, tasted something, heard something or touched something, in other words, perceived something by using any of the five senses that we have as human beings, that's direct evidence.

[90] Facts can also be proved by circumstantial evidence. Circumstantial evidence, very simply, is evidence from which you can draw a reasonable inference, or a reasonable conclusion. I use several examples to illustrate circumstantial evidence, and I will use the old saw where there's smoke, there's fire. Think about that. Let's assume that there's no evidence in a case, that there was fire at a particular location, but there is direct evidence that there was smoke at that location, the fact of smoke is circumstantial evidence of the fact of fire, and your reason tells you that that's so. So you can draw an inference, a reasonable conclusion, that where there's smoke, there's fire.

So in this case, if Fact A is proven to your satisfaction, you can draw a reasonable inference that Fact B also exists, although there is no direct evidence on Fact B, if Fact B normally and reasonably follows from Fact A.

So in deciding the facts in this case, what really happened here, you can consider both direct evidence and circumstantial evidence.

Now, a few words to you about the credibility of witnesses. You are the judges of the credibility, the believability of witnesses, and of the weight you will be to the testimony of each. It is your right to consider the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their interest of lack of interest, if any, in the outcome of the case, and their apparent intelligence or lack of [91] intelligence. From these factors together with all the other facts and circumstances proved at trial, you may determine which of the witnesses are the more worthy of belief.

You are not required to believe something to be a fact simply because a witness has stated it to be a fact, if in the light of all the evidence you believe that witness was mistaken or has testified falsely to the alleged fact. If you believe something stated by a witness that proposes something that is inherently impossible when considered in the light of all the evidence, you may disregard that statement, even in the absence of any evidence contradictory of the same.

Now a witness may be impeached, that is to say his or her credibility may be questioned by showing that on some prior occasion that witness made statements on a material issue in the case, which are contradictory of the testimony he or she gives at trial. If you believe from all the evidence that a witness did at some prior time make statements contradicting his or her testimony at trial, you may take this belief into consideration when determining the credibility of that witness and the weight that you will give to that witness' testimony.

If as a result of your deliberations you find that the evidence on the issue of liability weighs more on the side of the defendant, or that the evidence is so equally balanced that you cannot say whether it weighs in favor of the plaintiff or the defendant, then the plaintiff has failed to sustain her burden of [92] proof, and your verdict shall be for the defendant. However, if you find after deliberation that the evidence on the issue of liability weighs more on the side of the plaintiff, then the plaintiff has sustained her burden of proof and your verdict shall be for the plaintiff.

We will now turn to the question of damages. In discussing damages, I do not intend to indicate that I am of the opinion that defendant is liable. You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award as damages, if any, in the event that you do find the defendant liable. Of course, you need consider the question of damages only if you find for the plaintiff, for if you find that the defendant is not liable, no award of damages can be made.

Now damages must be proved. That is to say, the plaintiff must prove her damages by a fair preponderance of the evidence. Therefore, the amount that you may award as damages is subject to limitation in that you may make such award only to the extent that you find damage has been proved by the evidence before you.

You may not speculate or guess as to the amount you will award as damages. You must base that amount upon your consideration of the evidence before you, and it is required that you determine the precise amount which in

your considered judgment constitutes a fair and adequate compensation for such damages as you find have been proved.

In contract cases, there is a well accepted measure of [93] damages, and this is a contract case. If you find that the defendant was in breach of contract, then the money damages you should award are those which will put the injured party, the plaintiff, as close as reasonably possible in the same position she would have been in had the contract been fully performed by the other side. This is called the benefit of the benefit of the bargain measure of damages.

In this case, it's relatively simple. If you find the defendant liable, what the plaintiff lost, what would have been the benefit of her bargain would have been that she wouldn't have lost one year of her professional life. She lost one year of her professional life. Because it took her two years to finish up at St. Joseph's College, and so she lost the income for one year of her professional life, and she had to incur additional expenses for that extra year of college, and that essentially is the measure of damages in this case. You make the factual determinations of what that figure is if you find for the plaintiff.

It is required in order for you to return a verdict in this case that your decision be a unanimous decision of all six of you who will deliberate the case. You cannot return a verdict either for the plaintiff or for the defendant unless all six of you are in unanimous agreement as to what your verdict shall be, and if you find for the plaintiff and determine damages, all six of you must

agree on the precise sum which you will award as damages.

[94] Therefore, in the course of your deliberations and consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction because a majority on the panel holds a contrary conviction, but in pursuing your deliberations, you should keep your mind reasonably open with respect to the points in dispute, and listen to your fellow jurors as they will listen to you, all to the end that you will not be precluded from attaining unanimity by reason of just plain stubborness.

Prejudice, sympathy, or compassion should not be permitted to influence you in the course of your deliberations. All that either side here is entitled to, or for that matter expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence before you, and an application thereto of the law that has been given to you by the Court.

By giving you these instructions, this Court does not mean to imply that you should approach your consideration of the evidence in an intellectual vacuum. You are not required to put aside or disregard your experiences and observations in the affairs of life. Your experiences and observations in life are essential to your exercise of reasonably sound judgment and discretion in your deliberations, and it is your right to consider the evidence in the light of those experiences and observations, and of course, to use your God-given common sense.

If in the course of your deliberations you should deem it [95] necessary to be further instructed or assisted

by this Court, you should make that fact known to the officer in charge of the jury, who will then make arrangements for your return to the courtroom where you shall make your needs known to me here in open court through your forelady. Should such an occasion arise, that is to say you have a question, or you want some testimony read back to you because you can't agree on what it is, and it is important in your deliberations, don't send me a private note or message. Just simply tell the Marshal you want to come back to the courtroom with a question, he'll bring you back here and the forelady will address your question to me, and I will try to answer it for your right here in open court.

Madam Forelady, your duties are to preside over the deliberations of the jury, maintain order and decorum, give everyone an opportunity to state their views, and take votes when you think that would be productive. Although you, Madam Forelady, have only one vote as every other member of the jury, we need one person to speak for the jury, and that will be one of your important functions.

As you can see from the jury verdict sheet that I've given you, this is a relatively simple case in terms of the amount of verdicts. There's only one verdict to return, it's either for the plaintiff or for the defendant. And if you find for the plaintiff, then you will determine the amount of money to be awarded to the plaintiff for damages.

[96] We have one alternate juror in this case. I'm sorry, sir, that your services are no longer needed in this case. We thank you very much for being part of the jury, for being attentive throughout the trial, and for your

attendance on this trial. You are now discharged from this jury, and you can go on your way when the jury goes in to the juryroom for deliberations. Thank you very much.

The Clerk will now swear in the Marshal to keep the jury together.

(Marshal sworn)

THE COURT: All right. Do you have all the exhibits in one place, Madam Clerk?

CLERK: Yes, sir.

THE COURT: All right. Marshal, can you take those? All right. Before I send you out, ladies and gentlemen, let me tell you what my policy is concerning a deliberating jury so you won't have any question about it. ! will let you deliberate until about 5 o'clock. If you've reached a verdict, of course, before then, you will report it. But if you haven't reached a verdict by 5 o'clock, I will bring you in and I will ask you, Madam Forelady, whether you're close to a verdict. I'm talking about 15 or 20 minutes more of deliberations. If you tell me you're close to a verdict within those parameters, I will send you back out and you can finish up this afternoon. If you tell me you're not, we'll let you go home over the weekend, under instructions, of course, [97] not to discuss the case with anyone, and you can resume Monday morning. So that I want you to know that there are no pressures of time on you in deciding this case. You will have as much time as you need.

All right, Marshal, you may take the jury. Madam Forelady and members of the jury, you just follow the Marshal to the juryroom.

(Jury retired to deliberate at 2:36 p.m.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 85-0628L

SHARON L. RUSSELL

v.

SALVE REGINA COLLEGE, et al.

Before the Honorable Ronald R. Lagueux, District Judge

[OBJECTIONS TO JURY INSTRUCTIONS]

14 April 1989

[97] THE COURT: Now I will hear any objections to the charge to the jury, and I always look to the plaintiff first.

MR. HOGAN: Your Honor, I should like to have it recorded in the record our objection to two items of the charge. One, that portion which holds the contract, a document of December 18, 1984, to be a valid contract, and two, that part of the charge which incorporates it as a part of the contract between the parties, otherwise, I have no objections.

THE COURT: All right, defendant.

MR. SNOW: Your Honor, on behalf of the defendant, we object to three items. First of all, there's an omission of the list of uncontested facts that the parties had stipulated to as part of the pretrial proceedings. Secondly, the Court's instruction on substantial performance. As we indicated earlier to the Court, we believed that no instruction on substantial performance should have been given. And, finally, on the damage instruction, to the extent that the instruction seems to imply [98] that

the jury could award gross income for one year as damages, we believe it's incorrect. We believe there should have been an instruction that it was net income, net of all expenses that could have been reasonably expected to have been incurred by the plaintiff. Other than that, we have no objection.

THE COURT: The objections of both sides are in the record and noted, and now we will take a recess in this case until the jury returns with either a question or a verdict. I'll ask you to stand nearby so that if there is a question or verdict, we can take it rapidly. Unfortunately, no grass grows on the floor of this courtroom. We have another case scheduled to start immediately, so we will get going with that. We will take a recess then in this case.

(Recess)

(5:00 p.m.)

(Jury present)

THE COURT: Madam Forelady, I presume the jury has not reached a verdict.

FORELADY: No, we have not, your Honor.

THE COURT: All right. Do you think it's possible that you could reach a verdict in the next 15, 20 minutes?

FORELADY: No, sir, I do not.

THE COURT: All right, fine. Thank you. You may be seated. Then I will let you go for the weekend to resume Monday morning at 9 o'clock. Does 9 o'clock present a problem to any of [99] you? All right. We will

resume at 9 o'clock because I want to get you out deliberating and I have Naturalization at 9:30, and other things scheduled at 10, 10:30. Be back in the juryroom at 9 o'clock Monday morning.

I have three basic instructions to give you which I want you to abide by. The first instruction is most important. Do not discuss this case with anyone over the weekend.

Secondly, do not discuss this case among yourselves, between now and Monday morning. Even when you're in the juryroom waiting for me to bring you into the courtroom Monday morning at 9 o'clock, don't discuss it until I send you back out to resume your deliberations.

And, thirdly, if anyone approached you in an attempt to discuss the case, I will want to know that Monday morning because I've got to be sure that the integrity of the jury system is preserved. Now I don't mean, you know, if your wife or husband, family member says what's going on, you can tell them, look, we're still in deliberations, I can't talk about it. That's all right. But if somebody comes up to you and wants to talk about what your deliberating about and so forth, I will want to know that Monday morning. In other words, I want to be sure we all know that there's been no attempted influence upon you in your deliberations.

So three things to keep in mind. Number 1, don't discuss the case with anybody over the weekend; Number 2, don't discuss it [100] among yourselves; and Number 3, if anyone approaches you to discuss the case, I will want to know that, and I will question you Monday morning. I'll bring you back into the courtroom and I'll

ask you these questions to see whether you've complied with these instructions, and I've done it many times, and I've never had a jury who told me that there was any problem, so they resumed deliberations. So I hope you have a good weekend. It's always good to sleep on cases. We've had a long day, and you've heard arguments, you've heard my instructions, you've started your deliberations, and it's really good to sleep on it. I do that a lot when I have to render decisions. I like to sleep on it, come back the next morning. You will have a whole weekend to sleep on it, and Monday morning I'm sure you will be able to come back to deliberations with a fresh outlook. Are there any questions? Any problems? All right, we'll stand in adjournment then in this case until 9 o'clock Monday morning.

(Court adjourned)

JURY VERDICT

17 April 1989

[6] (Recess)

(Jury returns at 2:45 p.m. with a verdict)

(Jury present)

THE COURT: Madam Forelady, has the jury agreed upon a verdict?

FORELADY: Yes, we have, your Honor.

THE COURT: All right. Does the jury find for the plaintiff or for the defendant?

FORELADY: For the plaintiff.

THE COURT: All right, and in what sum for damages?

FORELADY: In the sum of $30,513.40.

THE COURT: All right. $30,513.40.

FORELADY: Correct.

THE COURT: All right. Thank you, Madam Forelady. Does anyone wish the jury polled?

MR. SNOW: Yes, please, your Honor.

THE COURT: All right. What that means is your name will be called individually, and then you will tell us what your verdict is. Rather than have you try to remember the figure, I will tell you that the verdict is for the plaintiff in the amount of $30,513.40 as reported by your Forelady. When you name is called individually, will you

tell us whether that is your [7] verdict, yes or now, individually.

(Jury polled)

AMENDED JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL v. SALVE REGINA COLLEGE, CATHERINE E. GRAZIANO, JOAN CHAPDELAINE, MARY LAVIN, MAUREEN HYNES, and BARBARA DEAN, INDIVIDUALLY, and in their capacity as faculty members	AMENDED JUDGMENT IN A CIVIL CASE CASE NUMBER: CA85-0628L

[XX] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the court's decision on motion for a directed verdict and on summary judgment, judgment is hereby entered on the amended complaint for all defendants on Counts II thru VIII.

Pursuant to verdict of the jury on April 17, 1989, on Count I, judgment is hereby entered on the amended complaint for the plaintiff, Sharon Russell against the defendant Salve Regina college, in the amount of $30,513.40 plus interest at 12% per annum from August 21, 1985 to April 17, 1989 totalling $13,390.05, making the total

judgment for the plaintiff in the amount of $43,903.45.

May 22, 1989

April 17, 1989 NUNC PRO TUNC
Date

Frederick R. DeCesaris
Clerk

/s/ Nita E. Andreasen
(By) Deputy Clerk
5/22/89

ORDER DATED MAY 22, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL Plaintiff	:	
v.	:	C. A. 85-0628 L
SALVE REGINA COLLEGE, et al Defendants	:	

ORDER

This matter came on for hearing on Monday, May 22, 1989, on the Motion of Defendant, Salve Regina College, for Judgment Notwithstanding the Verdict, for a New Trial and/or Remittitur, and for Amendment of Judgment. After submission of memoranda in connection therewith, and oral argument of counsel, and consideration thereof by the Court, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. Defendant, Salve Regina College's Motion for Judgment Notwithstanding the Verdict is denied.

2. Defendant, Salve Regina College's Motion for a New Trial is denied.

3. Defendant, Salve Regina College's, Motion for Remittitur is denied.

4. Defendant, Salve Regina College's, Motion for Amendment of Judgment, by agreement of the parties, is granted and the Judgment shall be amended so as to provide for the jury verdict in the amount of $30,513.40 plus interest from August 21, 1985 to April 17, 1989 in the

amount of $13,390.05; resulting in a total judgment of $43,903.45. Said judgment as amended shall be entered nunc pro tunc as of April 17, 1989.

5. By agreement of the parties, execution upon judgment is stayed pending appeal and it is agreed between the parties, and so ordered that neither party need post a supersedeas bond in connection with either the appeal or cross-appeal.

Entered as an Order of this Honorable Court this ___ day of May, 1989.

By Order:

/s/ Janice Cavaco
Clerk

Enter:

/s/ Ronald R. Lagueux
Lagueux, R
U.S.D.J.
5/23/89

Sharon L. RUSSELL,
Plaintiff, Appellee,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellants.

Sharon L. RUSSELL,
Plaintiff, Appellant,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellees.

Nos. 89-1564, 89-1597.

United States Court of Appeals,
First Circuit.

Heard Oct. 3, 1989.
Decided Nov. 20, 1989.

Steven E. Snow, with whom Partridge, Snow & Hahn, Providence, R.I., was on brief for Salve Regina College, et als.

Edward T. Hogan, with whom Hogan & Hogan, East Providence, R.I., was on brief for Sharon L. Russell.

Before BOWNES and TORRUELLA, Circuit Judges, and TIMBERS,* Senior Circuit Judge.

TIMBERS, Circuit Judge:

This consolidated appeal arises from the stormy relationship between Sharon L. Russell ("Russell") and Salve Regina College of Newport, Rhode Island ("Salve Regina" or "the College"), which Russell attended from

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*Of the Second Circuit, sitting by designation.

1982 to 1985. The United States District Court for the District of Rhode Island, Ronald R. Lagueux, *District Judge*, entered a directed verdict for Salve Regina on Russell's claims of invasion of privacy and intentional infliction of emotional distress at the close of plaintiff's case-in-chief, but allowed Russell's breach of contract claim to go to the jury.[1] The jury found that Salve Regina had breached its contract with Russell by expelling her. The court entered judgment on the verdict, denying Salve Regina's motions for judgment n.o.v. and for a new trial. The court also denied Salve Regina's motion for remititur of the damages of $30,513.40 plus interest, a total of $43,903.45, that the jury awarded Russell.

On appeal Russell contends that, because a reasonable jury could have found invasion of privacy and intentional infliction of emotion distress under Rhode Island law, the district court erred in entering a directed verdict on those claims. Salve Regina contends that the judgment that it breached its contract with Russell should be reversed because: (1) the court erred as a matter of law in its analysis of the contract between a student and the college she attended; and (2) even accepting the court's

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[1] This action originally was assigned to then-District Judge Bruce M. Selya. Judge Selya granted summary judgment in favor of the individual defendants on all counts and in favor of Salve Regina on five counts of Russell's complaint: due process, handicapped discrimination, negligent infliction of emotional distress, wrongful discharge and breach of convent of good faith. Russell does not raise the granting of summary judgment as to any of these counts on appeal. Judge Selya denied summary judgment on the three claims that are the subject of this appeal. *Russell v. Salve Regina College*, 649 F.Supp. 391 (D.R.I.1986).

formulation, there was insufficient evidence to support the jury verdict. It also argues that the calculation of damages was incorrect as a matter of law.

For the reasons set forth below, we affirm the judgment of the district court in all respects.

I.

We summarize only facts believed necessary to an understanding of the issues raised on appeal.

By all accounts, Sharon Russell was an extremely overweight young woman. In her application for admission to Salve Regina, Russell stated her weight as 280 pounds. The college apparently did not consider her condition a problem at that time, as it accepted her under an early admissions plan. From the start, Russell made it clear that her goal was admission to the College's Nursing Department.

Russell completed her freshman year without significant incident and was accepted in the College's Nursing Department starting in her sophomore year, 1983-1984. Her trauma started then.[2] The year began on a sour note when a school administrator told Russell in public that they would have trouble finding a nurse's uniform to fit her. Later, during a class on how to make beds occupied by patients, the instructor had Russell serve as the patient, reasoning aloud that if the students could make a

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[2] The facts recited here, which relate primarily to the distress and privacy claims that were the subject of the directed verdict, must be viewed in the light most favorable to Russell. *Bennett v. Public Service Co.*, 542 F.2d 92 (1st Cir.1976).

bed occupied by Russell, who weighed over 300 pounds, they would have no problem with real patients. The same instructor used Russell in similar fashion for demonstrations on injections and the taking of blood pressure.

The start of Russell's junior year, 1984-85, coincides with the time school officials began to pressure her directly to lose weight. In the first semester, they tried to get Russell to sign a "contract" stating that she would attend Weight Watchers and to prove it by submitting an attendance record. Russell offered to try to attend weekly, but refused to sign a written promise. Apparently, she did go to Weight Watchers regularly, but did not lose significant weight. One of Russell's clinical instructors gave her a failing grade in the first semester for reasons which, the jury found, were related to her weight rather than her performance.[3]

According to the rules of the Nursing Department, failure in a clinical course generally entailed expulsion from the program. But school officials offered Russell a deal, whereby she would sign a "contract" similar to the one she rejected earlier, with the additional provision that she needed to lose at least two pounds per week to remain in good standing. The "contract" provided that the penalty for failure would be immediate withdrawal from the program. Confronting the choice of signing the agreement or being expelled, Russell signed.

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[3] Significantly, Russell's other clinical instructor that semester considered her performance outstanding. In addition, Russell's academic record indicates at least satisfactory performance in all courses except the clinical one that she failed.

Russell apparently lived up to the terms of the "contract" during the second semester by attending Weight Watchers weekly and submitting proof of attendance, but she failed to lose two pounds per week steadily. She was nevertheless allowed to complete her junior year. During the following summer, however, Russell did not maintain satisfactory contact with College officials regarding her efforts, nor did she lose any additional weight. She was asked to withdraw from the nursing program voluntarily and she did so. She transferred to a program at another school.[4] Since that program had a two year residency requirement, Russell had to repeat her junior year, causing her nursing education to run five years rather than the usual four. Russell completed her education successfully in 1987 and is now a registered nurse.

Soon after her departure from Salve Regina, she commenced the instant action which led to this appeal.

II.

Subject matter jurisdiction over this case is based on diversity of citizenship. 28 U.S.C. § 1332 (1988). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (1988). The parties do not dispute that the law of Rhode Island applies to all substantive aspect of the case.

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[4] Although the record is unclear, it appears that the College told Russell that she would not be eligible to register for her senior year, but could apply for a change of status if she met the College's conditions. Russell instead chose to transfer. At any rate Salve Regina does not dispute that Russell's departure was not truly "voluntary".

We discuss first in section II of this opinion that two claims with respect to which the district court directed a verdict in favor of the College. Then in section III we discuss the contract claim which was submitted to the jury.

(A) *Intentional Infliction of Emotional Distress*

Rhode Island recognizes this tort theory. It has adopted as its standard § 46 of the Restatement (Second) of Torts (1965). *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I.1984). Section 46 states that:

> "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Restatement (Second) of Torts § 46.[5] Rhode Island has added the requirement of at least some physical manifestation. *Curtis v. State Dep't for Children*, 522 A.2d 203 (R.I.1987). Russell has alleged nausea, vomiting, headaches, etc., resulting from the College's conduct. This appears to create a triable issue on the causation and harm elements of the theory. The issue on appeal, therefore, is whether the conduct alleged is sufficiently extreme and outrageous.

In its arguments that the conduct of its employees does not rise to the necessary threshold, the College in

[5] Russell does not allege that the administration of Salve Regina intended to harm her, but rather that they hounded her without regard to the consequences.

essence concedes a pattern of harassment, but argues that the conduct was merely discourteous and necessary to carry out its academic mission.[6] We have no doubt that the conduct was insensitive, but to be tortious it must be "atrocious, and utterly intolerable in a civilized community." *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1021 (1st Cir.) (construing Rhode Island law and quoting Restatement, *supra*, § 46, comment d), *cert. denied*, 109 S.Ct. 65 (1988). Without regard to context, the College is correct; a series of insults, even if ongoing and systematic, is insufficient. But the context – the relationship of the plaintiff to the defendant and the knowledge of plaintiff's special sensitivities – is a necessary element of the tort. Prosser and Keeton, The Law of Torts, § 12, at 64 (5th ed. 1984). The school officials knew very quickly that Russell wanted badly to become a nurse and that she was easily traumatized by comments about her weight; yet they harassed her continuously for almost two years.[7] In this

[6] Regarding the latter point, the College correctly states that both the Restatement and Rhode Island law may excuse otherwise tortious conduct if taken to protect legitimate interests. *Champlin supra*, 478 A.2d at 988; Restatement, *supra*, § 46, comment g. The example provided is that of a heartless landlord exercising his privilege to evict a destitute family for nonpayment of rent. *Id.*, comment g, illustration 14. It is unable, however, to specify the interest served beyond "educational standards". We are unable to see what interest would be served by the petty, mean-spirited and concerted conduct in question. If anything, the interest of a college faculty and administrators should be the creation of an atmosphere of courtesy and tolerance.

[7] Salve Regina claims that an illustration set forth in the Restatement closely parallels this case:

(Continued on following page)

context, comments by school officials about weight were doubly hurtful.

Even considering the context and acknowledging this to be a close question, however, we affirm the district court's directed verdict dismissing the claim. "Extreme and outrageous" is an amorphous standard, which of necessity varies from case to case. The College's conduct may have been unprofessional, but we cannot say that it was so far removed from the bounds of civilization as not to comply with the test set forth in § 46. Russell's commendable resiliency lends support to our conclusion.

(B) *Intrusion of Privacy*

In Rhode Island, this tort is purely statutory; so we refer primarily to the statute itself, especially in light of the lack of case law interpreting the text. The relevant provision, R.I.Gen.Laws § 9-1-28.1(a)(1) (1985 Reenactment), covers only "*physical* solitude or seclusion"

(Continued from previous page)

> "A is an otherwise normal girl who is a little overweight, and is quite sensitive about it. Knowing this, B tells A that she looks like a hippopotamus. This causes A to become embarrassed and angry. She broods over the incident, and is made ill. B is not liable to A."

Restatement, *supra*, § 46, comment f, illustration 13.

In view of the ongoing nature of the conduct in the instant case, as well as the control Salve Regina held over Russell's professional future, the comparison to an isolated remark, even one made with knowledge of special sensitivity, is disingenuous.

(emphasis added).[8] The conduct at issue here does not fit easily within the scope of that language, since all of it occurred in public. The only area "invaded" was Russell's psyche. We cannot lightly predict that the Rhode Island Supreme Court would interpret the statute contrary to its literal language, in view of the statement of that Court that it will give statutory language its plain meaning absent compelling reasons to the contrary. *Fruit Growers Express Co. v. Norberg*, 471 A.2d 628 (R.I.1984). We therefore affirm the district court's directed verdict on the invasion of the privacy count.

III.

Russell's breach of contract claim is the only one the district court submitted to the jury. The College does not dispute that a student-college relationship is essentially a contractual one. *E.g.*, *Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir.1977), *cert. denied*, 435 U.S. 971 (1978). Rather, it challenges the court's jury charge regarding the terms of the contract and the duties of the parties.

From the various catalogs, manuals, handbooks, etc., that form the contract between student and institution, the district court, in its jury charge, boiled the agreement between the parties down to one in which Russell on the one hand was required to abide by disciplinary rules, pay

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[8] A separate section of Rhode Island's Privacy Law provides the "right to be secure from unreasonable publicity given to one's private life." R.I.Gen.Laws. § 9-1-28.1(a)(3)(1985 Reenactment). Recovery is available, however, only if a private fact is disclosed. The only material fact here, Russell's obesity, of course was quite public.

tuition and maintain good academic standing,[9] and the College on the other hand was required to provide her with an education until graduation. The court informed the jury that the agreement was modified by the "contract" the parties signed during Russell's junior year. The jury was told that, if Russell "substantially performed" her side of the bargain, the College's actions constituted a breach.

The College challenges the court's characterization of the contract. It claims the court ignored relevant provisions of publications from the Nursing Department; for example, those relating to the need for nurses to be models of health for their patients. These provisions, it argues, demonstrate that Russell was aware that success as a nursing student demanded more than competent performance. We hold, however, that the provisions on health speak to the duty of students to inform the Department of hidden health problems that might affect the students or their patients, and they are not a license for administrators to decide late in the game that an obese student is not a positive model of health.[10]

Salve Regina also challenges the application of strict commercial contract principles, *e.g.*, that, if Russell

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[9] There is no dispute that Russell met these criteria, with the exception of the clinical course she failed because of her weight.

[10] Judge Selya stated that "[c]ontagion was not legitimately at issue – after all, there is not allegation of communicable corpulence here – nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own wellbeing." *Russell, supra,* 649 F.Supp. at 405.

substantially performed, the College had an absolute duty to educate her.[11] It cites several cases which hold that colleges, in order properly to carry out their functions, must be given more contractual leeway than commercial parties. *E.g., Lyons, supra,* 565 F.2d at 202 (dean may reject faculty recommendation to reinstate student); *Slaughter v. Brigham Young Univ.,* 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975); *Clayton v. Trustees of Princeton Univ.,* 608 F.Supp. 413 (D.N.J.1985) (university must have flexibility to discipline cheating students). There can be no doubt that courts should be slow to intrude into the sensitive area of the student-college relationship, especially in matter of curriculum and discipline. *Slaughter, supra,* 514 F.2d at 627 ("substantial performance" standard is intolerable when it allows student to get away with "a little dishonesty").

The instant case, however, differs in a very significant respect. The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention

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[11] The College also argues that the jury finding of substantial performance is not supported by the record. We hold that the record demonstrates that the finding is not clearly erroneous.

that a court cannot use the substantial performance standard to compel an institution to graduate a student merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action. *Slaughter, supra*, 514 F.2d at 626.

In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir.1984); O'Rourke v. Eastern Air Lines Inc., 730 F.2d 842, 847 (2d Cir.1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error.

IV.

Salve Regina argues that the $25,000 damages awarded to Russell (the equivalent of a year's salary) constitutes legal error.[12] It contends that she is entitled to $2,000, representing her net savings after one year of employment. We disagree.

Since there appears to be no case law on this precise point,[13] we turn to familiar principles of contract law. The

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[12] The remaining damages, $5,513.40, constitute the costs incurred for Russel's additional year in college.

[13] The College's reliance on *Slaughter, supra*, is unavailing. The *Slaughter* court merely held that, because the substantial

(Continued on following page)

purpose of a contract remedy is to place the injured party in as good a position as it would have been in had the breach not occurred. *Rhode Island Turnpike and Bridge Auth. v. Bethlehem Steel Corp.*, 119 R.I. 141, 379 A.2d 344, 357 (1977). Since each case turns on the specific facts at hand, we consider it appropriate to accord the district court reasonable leeway. 5 Corbin on Contracts § 992 (1964 ed.).

Here, the district court's jury charge stated specifically that the proper remedy for the breach in question would be a year's salary. We cannot say that this was incorrect as a matter of law. The contract between Salve Regina and Russell was not motivated by economic concerns, at least on Russell's part; yet its breach clearly damaged Russell. She lost a year of her professional life. Under the circumstances, the salary Russell would have earned in that lost year strikes us as hardly a windfall. Moreover, the most closely analogous cases, involving damages for wrongful employment termination, hold that a plaintiff is entitled to the full salary, less any amount he was under a duty to mitigate. 5 Corbin, *supra*, § 1095 (collecting cases). We therefore affirm the damage award.

(Continued from previous page)

performance standard was inapplicable on the facts, it was improper to award the plaintiff the amount he would have earned had he received his doctorate earlier. 514 F.2d at 626. We are faced with the reverse situation: substantial performance in fact and proper application of the standard.

V.

To summarize:

We hold that the district court properly granted a directed verdict in favor of Salve Regina on the intentional infliction of emotional distress and invasion of privacy counts. We affirm the judgment in favor of Russell on the breach of contract count. We also affirm the damage award on the contract count.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1564

SHARON L. RUSSELL,
Plaintiff, Appellee,

v.

SALVE REGINA COLLEGE,
Defendant, Appellant.

No. 89-1597

SHARON L. RUSSELL,
Plaintiff, Appellant.

v.

SALVE REGINA COLLEGE, ET AL.,
Defendants, Appellees.

Before

Campbell, *Chief Judge*,
Bownes, Breyer, Torruella, Cyr, *Circuit Judges*, and
Timbers*, *Senior Circuit Judge*

ORDER OF COURT

Entered: January 16, 1990

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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*Of the Second Circuit, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Francis P. Scigllano

Clerk.

NOTE: Honorable Bruce M. Selya has recused himself.

[cc: Messrs. Snow and Hogan]

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(3)

No. 89-1629

In The

Supreme Court of the United States

October Term, 1990

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

1. Whether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship?

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 890 F.2d 484 and is reprinted in the Joint Appendix. The opinions of the district court denying petitioner's motions for a directed verdict are also reprinted in the Joint Appendix. Finally, the opinion of the district court granting summary judgment in favor of the petitioner on five of the eight counts of respondent's complaint is reported at 649 F. Supp. 391 and is reprinted in the Joint Appendix.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 10 of the Constitution of the United States. Powers Reserved to States or People – "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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28 U.S.C. § 1652. State Laws as Rules of Decision.

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
(June 25, 1948, Ch. 646, § 1, 62 Stat. 944).

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28 U.S.C. § 1291. Final Decisions of District Court.

"The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title."

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1989. A timely Motion for Rehearing with Suggestion for Rehearing *En Banc* was denied on January 16, 1990, and the petition for Writ of Certiorari was timely filed on April 16, 1990. The petition for Writ of Certiorari was granted, limited to question 1 presented by the petition, on June 28, 1990. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Salve Regina College ("Salve Regina" or the "College") is a catholic co-educational college of arts and sciences located in Newport, Rhode Island. Salve Regina has a department of nursing which awards a bachelor of science in nursing degree to successful graduates who, in the opinion of the faculty, have fulfilled the requirements of the degree.

2. Respondent, Sharon Russell, a citizen of Hartford, Connecticut, entered Salve Regina as a freshman in the fall of 1982. Toward the end of Russell's freshman year at Salve Regina, she sought admission to candidacy in the nursing department (F.C.J.A. 161a – 171a; PE16).[1]

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[1] References in the Statement of the Case are to the Joint Appendix ("J.A."), the Joint Appendix filed with the United States Court of Appeals for the First Circuit ("F.C.J.A."), Plaintiff's Exhibits ("PE"), and Defendant's Exhibits ("DE") in the record on appeal.

She began her nursing studies as a sophomore in the fall of 1983.

3. On her first day as a nursing student, Russell was advised of the nursing faculty's expectations of students (F.C.J.A. 535a-536a). At this time, Russell suffered from a serious addictive eating disorder resulting in her being extremely overweight. Russell was approximately 200 pounds overweight – a medical condition known as morbid obesity (F.C.J.A. 298a; 415a; 485a). Persons with morbid obesity are at significant medical risk because of their overweightness (F.C.J.A. 479a).

4. Upon beginning her nursing studies, Russell had a private meeting with her advisor at which time Russell's obesity was discussed. The advisor discussed some of the requirements of the program and the need for Russell to lose weight. The advisor told Russell she was concerned about Russell's obesity, both for Russell's personal health and its likely impact upon Russell's ability to perform as a professional nurse (F.C.J.A. 305a; 538a).

5. The first year (sophomore) nursing curriculum at Salve Regina consists primarily of academic courses – as contrasted to clinical training which forms a major part of the junior and senior year nursing curriculum. Russell performed satisfactorily in her purely academic work. Nevertheless, Russell's obesity started to interfere with her nursing training and performance as early as her sophomore year. For example, Russell was unable to complete a course in cardiopulmonary resuscitation offered at Salve Regina (F.C.J.A. 191a; 316a) after she fell on the training mannequin's head and required the instructor's

assistance to raise herself (PE29; F.C.J.A. 1205a). Thereafter, the College discovered that Russell had significantly understated her weight on a health data form it relied upon in making clinical training assignments. Confronted with the discrepancy, Russell promised the College's Clinical Agency Coordinator, the person in charge of assigning nursing students to clinical agencies, that she would lose weight before entering the clinical program (F.C.J.A. 316a, 723a). Russell also signed a form in which she agreed, among other things, to "accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not [Russell] can function in the clinical area" (F.C.J.A. 196a-197a; PE26).

6. Salve Regina's junior year nursing curriculum included a four credit nursing theory course and a four credit clinical training experience. Unfortunately, instead of dieting as she had promised, Russell had gained weight before starting her clinical training (F.C.J.A. 321a). The College permitted Russell to begin clinical training but, as the year progressed, the senior of Russell's two clinical instructors concluded that Russell's obesity was interfering with her nursing practice and training (F.C.J.A. 471a). Initially, Russell could not fit into the scrub gowns provided by the hospital in which she was training (F.C.J.A. 322a), thus precluding Russell from obtaining experience in the operating room (F.C.J.A. 583a). More serious concerns arose later. In her instructor's judgment, Russell was not internalizing and integrating concepts regarding nutrition and obesity and applying these concepts to her assigned patients (F.C.J.A. 573a; 584a).

7. At the conclusion of the fall semester of Russell's junior year, Russell was given a final clinical evaluation by the senior instructor (PE37). In that evaluation, Russell received six unsatisfactory grades and was informed that her professional performance was unsatisfactory (F.C.J.A. 231a; 594a-595a). The deficiencies noted by the instructor were all, in some respect, caused by or related to the physical and psychological ramifications of Russell's morbid obesity.

8. Salve Regina's Department of Nursing maintained a strict policy that even a single unsatisfactory grade in clinical training would result in a failing grade in the entire clinical course, leading to dismissal from the nursing program (F.C.J.A. 651a). In this case, however, the faculty was ambivalent about summarily dismissing Russell because of the unusual circumstances causing her failure (F.C.J.A. 593a; 652a). Russell's clinical instructor discussed the grade and available options with the department chairperson and indicated that she was willing to give Russell a passing grade if Russell would commit to losing weight.[2]

9. On December 18, 1984, a meeting took place between Russell, the clinical instructor and the department chairperson wherein an agreement was reached under which Russell would be given a passing grade in

[2] Russell consistently maintained that her obesity had no physiological basis and was within her power to change (F.C.J.A. 362a). She also insisted that her obesity was not a handicap (F.C.J.A. 362a). In the view of the clinical instructor, Russell's weight loss would likely improve the behaviors which concerned her (F.C.J.A. 627a).

the clinical course she had completed – thus avoiding expulsion from the nursing program – conditioned upon Russell entering a treatment program (Weight Watchers), achieving a weight loss of two pounds per week, and reporting her progress to the Clinical Agency Coordinator on a weekly basis (F.C.J.A. 232a; 625a). A written contract was prepared which established the conditions for Russell's continuation in the nursing program. The agreement provided, in part:

> I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the nursing program at Salve Regina College thus making me ineligible for Nursing 411.[3]

(PE38, F.C.J.A. 1237a).

10. Russell signed the written contract (F.C.J.A. 350a). Russell understood that if she could lose two pounds per week consistently, and otherwise meet the academic requirements, she would be allowed to continue in the program (F.C.J.A. 341a). Russell also understood that she had committed herself to withdraw voluntarily from the nursing program if she did not meet the contractual commitment (F.C.J.A. 708a).

11. In reliance upon Russell's contractual promises, Salve Regina allowed Russell to continue in the nursing

[3] The course referred to in the contract, Nursing 411, is the clinical training component required to be taken during the senior year and is a prerequisite for graduating from Salve Regina with a degree in nursing. Russell's eligibility for the theory portion of the senior year curriculum, Nursing 410, was not affected by the contract (F.C.J.A. 658a).

program on a probationary status (F.C.J.A. 647a; 729a). After entering into the contract, Russell began a weight treatment program and reported as required, but unfortunately she achieved only a fluctuating weight loss which did not average two pounds per week (F.C.J.A. 240a). After May 1985, Russell failed to report regularly as she promised and, regrettably, began to gain weight once again. In July 1985, Russell was advised that the department was disappointed in her progress and that Russell had not fulfilled the terms of the contract (F.C.J.A. 260a-261a). Russell was told that she probably would not be permitted to enroll in Nursing 411 (F.C.J.A. 761a).

12. Russell's entire net weight loss over the six month period of her contractual obligation to lose weight was only 10 pounds. Russell also had failed to report weekly to the Clinical Agency Coordinator as she had promised. As a result, Russell was informed on August 21, 1985, that she had not complied with the conditions for entering Nursing 411 and that her name was being removed from the list of students eligible to enroll for that course (F.C.J.A. 372a-373a).

13. Notwithstanding the department's action, Russell was still enrolled as a student at Salve Regina and could have qualified to graduate although Russell could not have graduated as a nurse within the normal four year time frame (F.C.J.A. 795a; 764a). To have graduated from Salve Regina as a nurse, Russell would have had to establish her eligibility for entering the senior year clinical training (Nursing 411), successfully complete the senior year clinical training, and complete the other requirements for the degree (F.C.J.A. 795a).

14. Instead of pursuing her available options, which included filing a grievance, seeking reinstatement to the nursing department, or changing majors (F.C.J.A. 661a), Russell transferred to St. Joseph's College in Connecticut (F.C.J.A. 267a). Russell had to repeat her junior year at St. Joseph's College (F.C.J.A. 268a) due to that institution's requirement that students earn at least 60 credits in residence before graduating with a nursing degree (F.C.J.A. 437a). One year after undergoing radical surgery which reduced her overweightness by 50%, Russell successfully completed her bachelor's degree in nursing at St. Joseph's (F.C.J.A. 156a).

15. This litigation was commenced by Russell in September, 1985 against Salve Regina and five individually named faculty members. The complaint alleged handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the denial of due process and unconstitutional interference with Russell's liberty and property interests, negligent and intentional infliction of emotional distress, invasion of privacy, wrongful dismissal, violation of implied covenants of good faith and fair dealing, and breach of contract (J.A. 5-19).

16. On November 17, 1986, the district court entered summary judgment in favor of defendants with respect to all of the claims save those involving intentional infliction of emotional distress, invasion of privacy, and breach of contract (J.A. 28-64). Since all the claims based upon federal law were dismissed, federal jurisdiction over the remaining claims was premised solely upon the diversity of citizenship, 28 U.S.C. § 1332(a)(1).

17. Pursuant to the district court's pre-trial order, the parties filed a joint statement which included 40 separate stipulations of fact agreed to by the parties (J.A. 65-81).

18. At the close of respondent's case-in-chief, the district court directed a verdict in favor of all the individual defendants on all of the claims against them, and directed a verdict in favor of Salve Regina on the claims of intentional infliction of emotional distress and invasion of privacy (J.A. 82-89). The district court ruled, however, that there was a triable issue with respect to breach of contract. Although the district court rejected Russell's claims that the weight loss contract was procured by duress and lacked consideration, and held that that special agreement which established the conditions for Russell's eligibility in the nursing program must be viewed as part of the overall relationship between Russell and Salve Regina (J.A. 85-87), the district court nevertheless stated:

> The basic question is whether Salve Regina College was justified in dismissing this plaintiff after completion of three years, and not allowing her to enter her fourth year, and final year, of the nursing program, toward a degree (J.A. 86).

The district court continued:

> In short, I think there is a legitimate question for the jury to decide as to whether the dismissal of the plaintiff in August of 1985 by Mrs. Chapdelaine, was reasonable and justified in view of the whole contractual relationship between the college and this plaintiff. In other words, it creates an issue of substantial performance . . . . If the jury can say that the plaintiff substantially performed her contractual obligations to the college, then they can say she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under the side agreement, then the jury can determine that the college justifiably dismissed her from the program (J.A. 87-88).

19. At the close of all of the evidence, Salve Regina renewed its motion for a directed verdict on the grounds, *inter alia*, that the plaintiff had admitted – as evidenced by the stipulated facts – that she had not met – nor came close to meeting – the conditions established for her continuance in the nursing program and that, as a result, Salve Regina was entitled to judgment as a matter of law. The College also urged that the "substantial performance" test was not applicable under Rhode Island law, or the law of any other state, in the unique context of the college-student relationship (F.C.J.A. 814a-817a). The district judge, while acknowledging that the Rhode Island Supreme Court had to-date limited the application of the "substantial performance" test to construction contracts, and while agreeing that the doctrine of substantial performance should not apply generally in the academic context, nonetheless ruled that he believed that the Rhode Island Supreme Court would apply the doctrine in this case. No analysis or legal rationale for this prediction was given (J.A. 90-91). The court denied the motion for a directed verdict and sent the case to the jury (J.A. 92-108). The College seasonably objected to the charge (J.A. 109-110).

20. The jury returned a verdict finding the College liable in damages for breach of contract (J.A. 113). The

district court denied the College's post-trial motions for judgment notwithstanding the verdict, for a new trial, and/or remittitur (J.A. 117-118), after which the clerk entered judgment (J.A. 115-116).

21. The court of appeals affirmed without engaging in any meaningful review of the case. Acknowledging that Rhode Island law applied to all substantive aspects of the case, the court of appeals characterized the case as one of "first impression" and noted that the district court believed that the Rhode Island Supreme Court would apply the substantial performance standard to the contractual relationship between a student and a college. Based upon the First Circuit's rule of deferring to interpretations of state law made by federal judges sitting in that state, the court of appeals held that the district court's determination was not "reversible error" (J.A. 130). The court of appeals also rejected petitioner's other grounds for appeal, considering it "appropriate to accord the district court reasonable leeway" (J.A. 131).[4]

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[4] The appellate panel found the "unique" position of the College as educator "less compelling" as a result of purported findings of the jury that Russell was forced into voluntary withdrawal from the nursing program solely because she was obese and did so after admitting her to the program with full knowledge of her condition (J.A. 129). In truth, there were no such jury findings. The jury was not instructed in a way which would have permitted any such findings, and the record would not have supported such findings even if they had been made. Rather, the record established that the College entered into a special contract with Russell because of academic failure related to her obesity and addictive behavior, and that her withdrawal was forced because of Russell's failure to fulfill the requirements mutually established for her continuation in the program.

SUMMARY

This case presents to the Court an important and potentially far reaching issue involving fundamental questions of fairness and the allocation of power between the federal and state judiciaries. The district court below applied its own opinion as to how the Rhode Island Supreme Court would view the complex relationship between a student and a college. Through the simple expedient of characterizing the case as one of first impression, the district court created a novel and highly troubling rule of state law while ignoring relevant decisions of the Rhode Island Supreme Court, legal precedent from other states following a similar doctrinal approach as the Rhode Island Supreme Court, and the reasoned views of legal commentators. Although the district court dressed up its decision in the guise of a prediction of what the Rhode Island Supreme Court would likely hold if the case were before it, no rationale or legal analysis accompanied the prediction. Except for the district judge's subjective feelings and belief, this creation of law for Rhode Island was totally without foundation.

Although courts of appeals exist for the purpose of correcting error of law made by district courts, the United States Court of Appeals for the First Circuit compounded the district court's error as a result of the standard of review it applies to district court determinations of state law – the so-called "rule of deference." Under this standard, the First Circuit deferred to the district court's presumed expertise in the law of the State of Rhode Island and uncritically accepted the district judge's prediction of state law. Thus, despite Salve Regina's statutory if not constitutional right to at least one appeal, that

right became largely meaningless because, under the rule of deference, the district court's interpretation of state law – even if incorrect – was not viewed as reversible error.

Conflict among the circuits now exists on the propriety of the rule of deference. While the majority of circuits still follow the rule of deference, the Court of Appeals for the Ninth Circuit, sitting *en banc*, has rejected the rule of deference and replaced it with full independent *de novo* review of state law determinations by a district court. *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc). The Third Circuit has now followed the lead of that watershed case.

The rule of deference practiced by the First Circuit is, in fact, a dramatic departure from traditional appellate court practice and is based neither upon pronouncements by this Court nor the Federal Rules of Civil Procedure. The rule of deference lacks a solid justification; the rule's only stated rationale is the district court's "expertise" in determining state law. In fact, it is easily demonstrated that the circuit courts of appeals, due to their inherent institutional advantages, possess far greater "expertise" than district courts in deciding issues of law – federal or state.

Moreover, since this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the constitution mandates the application of state rather than federal decisional law in diversity cases. Policies basic to this Court's decision in *Erie* mandate full *de novo* appellate review by courts of appeals of district judges' determinations of state law.

ARGUMENT

I. THE RULE OF DEFERENCE APPLIED BY THE COURT OF APPEALS IS UNSUPPORTED IN LAW AND LOGIC; FAIRNESS MANDATES DE NOVO REVIEW OF A DISTRICT JUDGE'S DETERMINATION OF STATE LAW.

A. The First Circuit's Rule of Deference and the Conflict Among the Circuits.

Since the advent of the constitutional doctrine established by *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), federal courts sitting by virtue of diversity jurisdiction have been required to apply state substantive law as pronounced by the forum state's courts and legislature. Furthermore, the Rules of Decision Act, 28 U.S.C. § 1652 (1982), requires all federal courts to apply state law in cases that do not arise under the Constitution, treaties or statutes of the United States. In instances where the state's highest court or legislature has specifically spoken on a state issue, the lower federal courts have had little difficulty finding and applying state law. A serious problem of ascertaining state law may arise, however, when neither the state's legislature nor its highest court has spoken on the question in issue. In those situations where state law is unclear, federal courts must attempt to predict how the state's highest court would rule if it were to face the state law issue. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).[5]

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[5] In *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943), this Court ruled that parties were entitled to have an adjudication of questions of state law in diversity cases, although such a rule does not appear to be constitutionally or statutorily mandated.

When a party appeals a federal district court's interpretation of state law to a federal circuit court of appeals, most federal appellate courts traditionally have deferred to the district court's interpretation of that law. *See, e.g.*, 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507 at 106-07 (1982). This "rule of deference," so-called, continues to be the law in the First Circuit. Thus, applying what it characterized as the "customary appellate deference accorded to interpretations of state law made by federal judges of that state," the First Circuit Court of Appeals in the instant case did not engage in any meaningful review of the district court's prediction that the Rhode Island Supreme Court would rule that a student's substantial – although not full – performance in meeting the requirements for continuing or completing an academic program is sufficient.[6] The First Circuit

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[6] Despite exhaustive research, the College has found no other case in the academic or educational context in which the commercial contract doctrine of "substantial performance" has been applied. To the contrary, the only courts that appear to have considered the application of such a doctrine have rejected it. *Slaughter v. Brigham Young University*, 514 F.2d 622, 627 (10th Cir. 1975); *Clayton v. Trustees of Princeton University*, 608 F. Supp. 413, 435 (D.N.J. 1985). What is more, the doctrine of substantial performance is inherently unworkable in the academic context. Imagine, for example, a student who successfully completes 124 out of 128 credits required for graduation. Should a jury be permitted to conclude that the student "substantially performed" the requirements and, thus, is entitled to a degree? Would anyone wish to be treated by a nurse who "substantially performed," but did not fully meet the requirements for graduation? Professional education requires subjective evaluation in non-cognitive areas like clinical performance, and the law must respect a faculties' professional

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failed to analyze the district court's novel interpretation of Rhode Island law because it is "reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices." *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir. 1984); *Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982); *Berrios Rivera v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978); *New Hampshire Automobile Dealers Ass'n. v. General Motors Corp.*, 801 F.2d 528, 532 (1st Cir. 1986).

In support of its rule of deference, the First Circuit has cited Supreme Court authority as well as cases from other circuits.[7] Although the courts of appeals have used

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judgement as to the level of performance. *Cf. Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

[7] The First Circuit has cited *Bishop v. Wood*, 426 U.S. 341 (1976), *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), and *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976) as authority for applying its rule of deference. *See, New Hampshire Automobile Dealers Ass'n. v. General Motors Corp.*, 801 F.2d 528, 532 (1st Cir. 1986) (citing *Bishop*); *Berrios Rivera v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978) (citing *Bernhardt*); *Graffals Gonzalez v. Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam) (citing *Runyon*). In the instant case, the First Circuit cited authority from the Second Circuit (*O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842, 847 (2d Cir. 1984). The First Circuit has previously relied upon authority from the Fifth, Sixth, Seventh and Tenth Circuits (*see Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982)) and the Fourth and Eighth Circuits (*Berrios Rivera v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978)) in support of its rule of deference.

various terms to characterize the deferential standard of review[8], until 1984, all circuits applied deference to district court interpretations of state law.

In 1984, the United States Court of Appeals for the Ninth Circuit became the first circuit to reject the deferential standard by announcing, in an *en banc* decision, that anything less than "full independent *de novo* review" of state law determinations by the district courts amounts to an "abdication" of appellate responsibility. *In Re McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc).[9] *In Re McLinn* was a wrongful death and personal injury suit arising from the collision of two skiffs in Alaska. The defendant skiff owners moved for summary judgment,

[8] In a comprehensive scholarly article, Professor Dan T. Coenen of the University of Georgia School of Law has prepared a circuit-by-circuit review of the rule of deference. *See, To Defer or Not to Defer: A Study of Federal Circuit Deference to District Court Rulings on State Law*, 73 Minnesota L.Rev. 899, 963-1017 (1989). According to Professor Coenen, most circuit court panels give "great weight," "substantial weight," "considerable weight," or "great" or "substantial" deference to district court rulings on state law. At least two circuits go further. The Tenth Circuit has held that such rulings carry "extraordinary force" and should stand unless they are "clearly erroneous" or "clearly wrong." The Sixth Circuit has stated that it will not reverse "if a federal district court has reached a permissible conclusion upon a question of local law." *Id.* at 902-903.

[9] The Third Circuit has now followed the Ninth Circuit's lead. In *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988), The Third Circuit cited *McLinn* with approval and held that district court determinations of state law are subject to plenary review.

raising an issue which depended upon the proper interpretation of an Alaska statute relating to liability of boat owners. The district court granted the motion for summary judgment and the plaintiff appealed. On appeal, a three judge panel determined that the outcome of the case depended upon whether the appellate court applied a deferential standard of review to the district court's determination of state law, or decided the state law issue *de novo* without any deference to the district court's opinion. The panel requested a rehearing *en banc* to determine the appropriate standard. In the *en banc* opinion, the Ninth Circuit acknowledged that appellate courts ordinarily had deferred to a district court's interpretation of state law unless that interpretation was clearly wrong. *Id.*, at 1398. This deferential rule stood in stark contrast to the exercise of independent plenary review of a federal district court's findings of federal law. The *McLinn* court reasoned that an appeal on an issue of state law should entitle the parties to the same *de novo* review that the federal appeals courts accord to issues of federal law.

In rejecting the rule of deference, the Ninth Circuit marshalled arguments of policy and authority against the rule in a well-crafted and thoughtful discussion.[10] The

[10] Most scholarly comment on *In Re McLinn* has supported rejection of the deferential standard of review in favor of *de novo* review. *See* Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 Minnesota L.Rev. 899 (1989); Comment, *What is the Proper Standard for Reviewing a District Court's Interpretation of State Substantive Law?*, 54 Cincinnati L.Rev. 230 (1985); Comment, *A Non-Deferential Standard for Appellate Review of State*

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Ninth Circuit reasoned in *McLinn* that numerous structural differences between the federal appellate courts and district courts demonstrate that *de novo* review is the only appropriate standard for reviewing district court determinations of law – regardless of the law's state or federal origins. First, appellate courts do not hear evidence and are therefore free to concentrate on legal issues. *Id.* at 1398. Second, circuit courts of appeals generally sit in three-judge panels in contrast to a single district court judge, thus reducing the risk of error. *Id.* at 1398. Third, precedential importance of federal appeals courts' opinions regarding state law confers a weighty responsibility to give *de novo* review to all legal decisions. *Id.* at 1401-02. And, finally, the *de novo* standard of appellate review permits the Supreme Court to conserve its resources for important questions of national scope. *Id.* at 1399-1401.

The Ninth Circuit noted in *McLinn* that appellate courts have given only one reason for applying a deferential standard of review – that a federal district judge is more likely than a federal appellate judge to have practiced law in the state and, thus, a district judge is generally more familiar with state law. *Id.* at 1400. Criticizing this traditional justification, however, the Ninth Circuit reasoned that a district judge should be able to articulate a basis for the judge's interpretation of state law by reference to legislative materials, commentaries on the law, and judicial opinions. *Id.* Moreover, the Ninth Circuit

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Law Decisions by Federal District Courts, 42 Washington and Lee L.Rev. 1311 (1985); *But see* Woods, *The Erie Enigma: Appellate Review of Conclusions of Law*, 26 Arizona L.Rev. 755 (1984).

noted that reliance on the district judge's experience transfers attention from the basis of the decision to the judge's biography and other personal characteristics not revealed by the record. *Id.* This tendency to place the judge's experience in issue is, according to the Ninth Circuit, both inefficient and improper. *Id.*

In support of its view that this Court has never required appellate courts to give deference to district court interpretations of state law, the Ninth Circuit cited *Butner v. United States*, 440 U.S. 48, 58 (1979), in which this Court declined to review the Fourth Circuit's interpretation of North Carolina law which was at odds with the North Carolina district court's original decision on the issue. The Ninth Circuit observed that implicit in this Court's decision not to review the state law question was the assumption that the Supreme Court need not exercise its discretionary jurisdiction because the appellate panel had exercised its mandatory appellate jurisdiction by giving full and independent review to the decision of the district court. 739 F.2d at 1399.

As the Ninth Circuit and subsequent scholarly research has demonstrated, the rule of deference practiced by the First Circuit and others is a dramatic departure from traditional appellate court practice and is based neither upon pronouncements by this Court nor the Federal Rules of Civil Procedure. Moreover, the rule's only stated rationale of district court "expertise" in determining state law fails to withstand careful scrutiny.

B. The Rule of Deference Lacks a Sound Rationale.

The right to at least one appeal is firmly rooted in our jurisprudence.[11] This thesis is at least statutory if not constitutional in origin. *Cf.* 28 U.S.C. § 1291; *Griffin v. Illinois*, 351 U.S. 12 (1956). Also well settled is the concept that the central task of an appellate court is to decide questions of law. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

When federal or foreign law issues are appealed to the circuit courts, they uniformly use a *de novo* standard of review. *See, e.g., United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). If, after identifying the controlling statute or principle of common law, the appeals court's conclusion differs from that of the trial court, the higher tribunal's opinion prevails. *See* W. Rehnquist, *The Supreme Court, How It Was, How It Is* 267 (1987). This rule of *de novo* review runs deep in our jurisprudential history. *See, e.g. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410 (1821); *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 329-30 (1796). The rule of deference applied by the First Circuit, however, clashes with this historic approach and

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[11] *See Standards Relating to Appellate Courts* § 3.10, commentary at 14 (1977); Hopkins, *The Role of an Intermediate Appellate Court*, 41 Brooklyn L.Rev. 459, 463 (1975); Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 Hofstra L.Rev. 648, (1975); Rubin, *Views from the Lower Court*, 23 UCLA L.Rev. 448, 459 (1976).

produces results different from those that would be reached through traditional *de novo* review.[12]

The First Circuit's rule of deference is not mandated by this Court[13] or by the Federal Rules of Civil

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[12] *See* Coenen, *supra* note 8, at 902, n.16.

[13] The authorities cited by the First Circuit, including *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976), *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), and *Bishop v. Wood*, 426 U.S. 341 (1976), do not support the rule of deference. In *Runyon*, for example, there was no disagreement between the district court and the court of appeals in the interpretation of a Virginia statute of limitations. The *Runyon* opinion makes clear that the Supreme Court did not defer to the initial conclusion by the trial judge, but rather accepted the "considered judgment" of the court of appeals. 427 U.S. at 180-82. In *Bernhardt*, this Court gave "special weight" to an interpretation of Vermont law made by a district judge, although the state law ruling was not considered by the court of appeals, which rested its decision on an alternative analysis. *See* 350 U.S. at 207 (Frankfurter, J., concurring). Importantly, this Court ruled in *Bernhardt* that because the Vermont law in question appeared clear, no reason existed to remand the case to the Second Circuit for review of the district court's decision. *Id.* at 205. This Court went on to observe, however, that "[w]ere the question in doubt or deserving further canvass, we would of course remand to the court of appeals to pass on this question of Vermont law." *Id.* at 205. Thus, *Bernhardt* does not support the rule of circuit court deference to district court rulings on state law. Rather, this Court's specific endorsement of remand to the circuit court to pass on state law issues whenever they are in doubt appears to cut against recognition of a general rule of circuit court deference. Finally, in *Bishop v. Wood*, while noting the state law experience of the federal district judge in this Court's decision to leave the holding below undisturbed, this Court also noted that the Fourth Circuit had concurred with the district judge. 426 U.S. at 345-46. In short, this Court has only deferred to

(Continued on following page)

Procedure.[14] Rather, the rule of deference is a creation of the courts of appeals based upon the view that federal district judges have more expertise in matters of state law than appellate judges. This view is simply wrong.

There is no reason to believe that district courts are generally more expert than the courts of appeals in deciding issues of state law.[15] While a district judge may have more familiarity with the law of the state in which he sits than the average court of appeals judge, institutional factors such as time constraints and the quality of trial advocacy call into question whether a district court is in a

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(Continued from previous page)

determinations made by three-judge appellate panels or district court rulings that have been affirmed on appeal, which is quite distinct from the 13 federal circuit courts deferring in thousands of state law cases, leaving unreviewed the findings of single district court judges.

[14] At least one circuit has cited Rule 52(a) of the Federal Rules of Civil Procedure, which provides that "findings of fact . . . shall not be set aside unless clearly erroneous," to support the use of a "clearly erroneous" or "clearly wrong" standard to define the degree of deference afforded state law rulings. *See, Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985). The "clearly erroneous" standard of Rule 52, however, is based upon the trial judge's unique opportunity to judge the accuracy of witnesses' recollections and make credibility determinations – factors that are not relevant to a conclusion of law – be it federal or state. Leading commentators have agreed that the "clearly erroneous" standard of review is not properly applied to state law rulings. 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 109 ("determination of state law . . . is a legal question"); J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶0.309[2], at 3128.

[15] *See* Coenen, *supra* note 8, at 920-937.

position to render a more expert decision on state law than an appellate panel. Certainly, in the 1990s, it is unreasonable to suggest that every federal district court judge possesses an expertise in a substantial portion of state law – encompassing a sufficient depth and breadth of understanding of legal issues – which outweighs the significant institutional advantages enjoyed by the courts of appeals in deciding pure issues of law. In contrast to courts of appeals, district judges necessarily must rule on important legal issues without benefit of extended reflection or extensive briefs and argument[16]. The trial judge, after all, is burdened with the conduct of the trial. Courts of appeals, on the other hand, have the luxury of focusing upon only a few issues of law, as well as the benefit of comprehensive written briefs by the parties and access to the full printed trial record, extensive library resources and research assistance. Moreover, the circuit courts have the institutional advantage of multi-judge panels in which each judge benefits from the others' insights, as well as the ability to question counsel at length

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[16] The facts of the case at bar well illustrate this point. Neither of the parties to this litigation raised the issue of applying the doctrine of substantial performance to the academic contract between Russell and the College. The issue was raised *sua sponte* by the district court when denying petitioner's motion for a directed verdict on the contract count. (*See* J.A. 88). Neither counsel nor the trial court had the luxury of time to conduct extensive research into the question during the trial. Such research was performed after the trial, and the results were presented to the Court of Appeals. Unfortunately, due to the application of the rule of deference, the results of the research were ignored by the Court of Appeals in deference to the findings of the district judge.

during oral argument. This deliberative process is specifically designed to increase the accuracy of decisions – the very purpose for having appeals in the first place.

Courts of appeals have other institutional advantages. They are by nature more insulated from political and personal pressures than district courts. Unlike district courts, deciding issues of law expertly is their primary role. They have far more time to research, reflect upon, and write about fewer legal issues than a district judge could ever hope to have. These institutional differences suggest that the courts of appeals possess far greater "expertise" than district courts in deciding state law issues. Or put another way, application of the rule of deference more often reduces the chance that litigants will obtain the most accurate interpretation of state law.

C. Negative Effects of the Rule of Deference.

In addition to lacking a solid justification, the rule of deference employed by the First Circuit creates serious problems which undermine the goals the appellate process is designed to achieve. The deference standard is vague and invites uncertain and uneven appellate review. The rule produces circuit court decisions that, as a practical matter, create state law precedent even though the holding of the appellate panel is not an independent construction of state law. *See In Re McLinn*, 739 F.2d 1395, 1402 n.3 (9th Cir. 1984). Moreover, the rule leaves the losing party with the distinct impression that they did not get a fair hearing on appeal. When a district court's decision involving a state law issue is affirmed simply

because it was issued by a district court judge, the aggrieved party is likely to view the system as a mockery of fair play, thus undermining an important purpose of appellate review – to defuse antagonism and hostilities by litigants by affording a fair hearing, both in fact and in appearance. The public's confidence in our judicial system is undermined by such a rule.

Finally, the belief that a district judge retains some special knowledge or expertise of state law which should be factored into a standard of appellate review is, in fact, a dangerous belief. This belief gives weight to an intangible factor – the experience or background of the judge – which factor is not in the record. If there truly are special details of state law that would have an effect upon how that state's highest court would rule upon an issue, there is no reason to believe that those details could not adequately be expressed and argued before a court of appeals, just as any other facet of the case would be.[17]

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[17] *See* Comment, *supra* note 10, 54 Cincinnati L.Rev. at 226; *see also* Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 66 Yale L.J. 187, 217 (1957):

> [T]he very essence of the Erie doctrine is that a federal judge can find, if not make, the law as well as a state judge. Certainly, if the law is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California. The bases of state law are assumed to be communicable by lawyers to judges, federal judges no less than state judges.

Id.

II. A DE NOVO REVIEW BY A CIRCUIT COURT OF APPEALS OF A FEDERAL DISTRICT JUDGE'S DETERMINATION OF STATE LAW IS MANDATED BY THE ERIE DOCTRINE.

The policies which are basic to this Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), mandate full appellate review of a district court's determination of state law by a court of appeals. In *Erie*, this Court ruled that equal justice required, to the extent possible, application of the same law to all persons regardless of their citizenship, and neutralization of the advantage of forum shopping. 304 U.S. at 74-78. This Court announced in *Erie* that the constitution (presumably the Tenth Amendment) requires that federal courts, sitting in diversity jurisdiction, apply state "substantive" law. 304 U.S. at 78-80.[18] The *Erie* problem presented by the rule of deference is obvious. State appellate courts, such as the Rhode Island Supreme Court, do not afford special deference to trial court rulings on state law. *See, e.g., Fryzel v. Domestic Credit Corp.*, 120 R.I. 92, 98, 385 A.2d 663, 666 (1978); *Emerson Radio of New England, Inc. v. DeMambro*, 112 R.I. 300, 305, 308 A.2d 834, 838 (1973). State appellate

[18] While there has been much debate concerning the constitutional underpinnings of *Erie*, there seems to be no question that this Court considers Erie to state a rule of constitutional law. *See Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 202 (1956); *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 Bos. U.L.Rev. 659 (1938); Friendly, *In Praise of Erie – and of the New Federal Common Law*, 89 N.Y.U.L.Rev. 383, 384-398 (1964); Hart, *The Relations Between State and Federal Law*, 54 Columbia L.Rev. 489, 509-510 (1954); Hill, *The Erie Doctrine and the Constitution*, 53 N.W.U.L.Rev. 427, 541 (1958).

review proceeds *de novo*. Thus, but for the accident of respondent's domicile which allowed respondent to bring this case to a federal forum, this matter would have been tried before a Rhode Island trial court and the parties would have been accorded full appellate review by the Rhode Island Supreme Court – the state's highest judicial authority.

What happened, however, is that the First Circuit Court of Appeals, by applying the rule of deference and affording special weight to the trial court's state law conclusions, placed Salve Regina College in a decidedly different posture. By applying the rule of deference, Salve Regina College was not only foreclosed from a definitive ruling on state law, it was foreclosed from any meaningful judicial review of the district court's speculation as to state law. In essence, the federal district court alone was substituted for the entire state court system.

Since, as earlier demonstrated,[19] application of the rule of deference more often reduces the chance that litigants will obtain the best reading of state law, the rule clashes sharply with the guiding principle of Erie. State court litigants have a far greater chance that an appellate court will correct an error of law than do litigants who find themselves in federal court due to the accident of diversity of citizenship. Such unequal justice offends *Erie*. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

One of the chief aims of the *Erie* doctrine is to promote uniform development of substantive law in order to discourage forum shopping. In this context, the state-

[19] *See infra* 24-26.

created right of appellate review is clearly substantive under the interest-balancing approach long utilized by this Court in applying the Erie doctrine.[20] *See, e.g. Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536-38 (1958). Application of the rule of deference unquestionably discriminates against appellants in the federal forum since the losing party will not have the ability to obtain *de novo* review. Moreover, because *de novo* review by a multi-judge court is part of Rhode Island's design for deciding appeals involving its citizens and its laws, application of the rule of deference by the First Circuit frustrates an important state interest. By the same token, deference frustrates the laudable goals of *Erie* because "[t]he essence of diversity jurisdiction is that a federal court enforces State law and State policy." *Angel v. Bullington*, 330 U.S. 183, 191 (1947). Thus, a rank discrimination against state law cases and litigants contravenes *Erie's* fundamental goal of safe-guarding "the proper distribution of judicial power between State and federal courts." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110 (1945).

The disadvantage due to the original choice of forum for the party seeking reversal, because they would have received a *de novo* review had the state court forum been chosen, may have an effect upon the party's choice of forum, thereby promoting forum shopping. *See, e.g.*,

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[20] The interest balancing approach for deciding whether to characterize legal rules as "substantive" or "procedural" focuses upon four considerations: equal administration of law; the state interest underlying the state rule; the federal interest, if any, in applying the federal rule; and the rule's effect on forum shopping. *See generally*, C. Wright, *The Law of Federal Courts* § 59, at 386 and n.55 (4th ed. 1983).

Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). This is precisely what *Erie* was designed to guard against. To discourage forum shopping, litigants must face the same burden of convincing the court which interpretation of state law is the correct one regardless of whether they are in a state or federal forum. This constitutionally mandated goal cannot occur as long as the federal circuit courts use a different standard of review than used by state appellate courts. This Court can remedy this prohibited disparate treatment by compelling the courts of appeals to adopt the *de novo* review standard.

Other decisions of this Court mandate the use of *de novo* review by courts of appeals. In *Wichita Royalty Co. v. City Nat'l. Bank*, 306 U.S. 103 (1939), this Court held that a court of appeals in a diversity case is "substituted" for the state supreme court and must interpret state law as the state's high court "would have declared and applied it." *Id.* at 107. Thus, under *Wichita Royalty*, the First Circuit Court of Appeals should have applied the same *de novo* review as the Rhode Island Supreme Court would have applied.

Moreover, this Court has held that state law rules governing presumptions and burdens of proof control in federal diversity cases. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Logically, presumptions and burdens of proof are substantive at the appellate level as well as trial level.[21]

Finally, this Court has instructed that "[t]he *Erie* rule is rooted in part in a realization that it would be unfair

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[21] *See* Coenen, *supra* note 8 at 954.

for the character or result of a litigation materially to differ because the suit had been brought in federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965). The deference accorded by the First Circuit in this case unquestionably changed the "character" if not the result of the appellate inquiry. Had this litigation proceeded in state court, Salve Regina College would have received a more rigorous appellate review than it received in the First Circuit. This discrimination occurred only because of the "fortuitous circumstance of residence out of a state." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945).

CONCLUSION

The special deference granted by the First Circuit Court of Appeals to district court rulings on matters of state law is ill-conceived. It lacks a sound rationale and conflicts with the traditional functions and role of appellate courts. Moreover, the rule of deference produces second-rate appellate review of state law rulings in federal courts in a way which offends the *Erie* doctrine.

This Court should rule that every party is entitled to a full, considered, and impartial review of a decision of a district court. There is no justification for being less thorough, for abdicating any portion of a circuit court's appellate responsibility, or for curtailing a party's appellate rights simply because the law involved is state law. Litigants are entitled to careful, independent consideration of issues of law by the circuit courts of appeals regardless of the federal or state origins of the law in question.

For the reasons stated, this Court should reverse the judgment of the United States Court of Appeals for the First Circuit and remand for an independent *de novo* review of the issues of state law raised by petitioner. Alternatively, this Court should reverse and certify the question of the applicability of the commercial contract doctrine of substantial performance to the academic relationship between a student and a college to the Rhode Island Supreme Court for resolution. Through this alternative, the court best equipped to answer the state law question could do so in a definitive manner, and the equality of treatment which the *Erie* doctrine was aimed to accomplish would be assured.[22]

Respectfully submitted,

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[22] Rule 6 of the Rules of the Supreme Court of the State of Rhode Island authorizes that tribunal to answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court if there are involved in any proceedings before it questions of Rhode Island law which may be determinative of the cause then pending in the certifying court, and as to which it appears to the certifying court there is no controlling precedent.

[redacted]

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT ON MERITS

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No. 89-1629

In The

Supreme Court of the United States

October Term, 1990

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT ON MERITS

STATEMENT OF THE CASE

The facts of the case are set forth in the Petitioner's Petition for Writ of Certiorari filed April 16, 1990; in the Respondent's Brief in Opposition filed on or before June 8, 1990; and in the Joint Statement of the Parties filed in the District Court February 13, 1987 (J.A. 65-81).

On June 28, 1990, this Court granted the Petition for Certiorari " . . . limited to Question 1 presented by the petition.", which reads:

"1. Whether a party is entitled to a *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship?"

Since the question poses a legal issue only, further reference to the facts is unnecessary.

PROLOGUE

The petitioner in its Petition for Writ of Certiorari, and again in its Brief on the Merits, misstates what the district court held when it ruled the doctrine of substantial performance applicable to the case at bar. As we have said in our Brief in Opposition, we recognize that the question of whether the doctrine is correctly applied is not technically before this Court. But for the petitioner's insistence in raising it again in its Brief on the Merits, we would not address the issue at this point. That repetition by the petitioner does, we feel, require some response, however brief. In this regard, we refer the Court to pages 7 through 12 of our Brief in Opposition which we set out as Appendix A hereto. All of the cases cited by the petitioner in footnote 6 on page 16 of its Brief on the Merits are distinguished by us from the case at bar in said Appendix A hereto. As we have said before, this is not a case of student versus academia. Here the relationship between the parties was and is unique. The district court, in recognizing this factor and applying the doctrine of substantial performance did not make a prediction that the Rhode Island Supreme Court would rule that a student's substantial – although not full – performance in

meeting the requirements for continuing or completing an academic program is sufficient. The District Court did not rule that a jury should be permitted to conclude that a student who substantially performed the academic standards would be entitled to a degree; nor did it rule that anyone should be treated by a nurse who substantially performed but did not fully meet the requirements for graduation. What the district court did hold and rule is succinctly stated in Appendix A to our Brief in Opposition. What the circuit court had to say about the issue is set forth in Appendix B to that Brief. At this juncture we respectfully refer the Court to those comments and for the convenience of the reader set them out again as Appendices B and C respectively hereto.

SUMMARY

The alleged conflict between the various Circuit Courts of Appeal as to the appropriate appellate review standard to be applied in passing upon a district judge's holding as to an unsettled state law question in diversity cases is more imaginary than real; founded upon the mistaken notion that those circuits which espouse the "deferential" rule adopt the lower court's ruling blindly and without study or thought. In practice, the "deferential" circuits do give a full and meaningful review of the law questions involved and only when satisfied that the district judge was correct do they hold him "not clearly wrong" or "not guilty of reversible error".

The ever increasing volume of pending cases in all circuits mandates that those courts conserve their judicial

manpower and expend it in a fashion designed to bring about the most effective use thereof, in that field of law, i.e., federal cases, where they have not only superior expertise, but are also vested with superior judicial power by Congress. Diversity cases, involving state law questions, do not fall within the scope of the circuit court's expertise, nor does plenary review of such state law questions, by way of lengthy and time-consuming opinions that merely affirm the district judge's ruling, do much to advance the *Erie* goals of discouraging forum-shopping and uniformity, nor conserve precious judicial time and energy for use in more pressing federal policy cases. The long standing "deferential" rule of review, which is in reality nothing more than judicial shorthand for an opinion which affirms the district judge's holding on an unsettled state-law question, does both. The inherent and fundamental differences in the nature of issues presented in diversity cases from those which permeate federal cases, as well as the differences in those courts' authority in construing the law in those distinctly distinguishable cases, militate against the concept of requiring detailed judicial opinion writing in every diversity case.

ARGUMENT

I. Prior to *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc) Circuit Courts of Appeal recognized the "predictive" nature of a federal district court's determination of what a state supreme court might at a later date hold state law to be, as to questions unsettled at the time the district court acted.

II. Recognizing this "predictive" element, Circuit Courts of Appeal historically gave deference to a district court's determination, although the standard of deference was expressed in various ways.

III. Matter of *McLinn, supra*, at least on a superficial reading, imports into our jurisprudence a new standard for appellate review of such district court rulings; i.e., a de novo or plenary review with no deference accorded to the lower tribunal's "prediction".

IV. In reality, matter of *McLinn, supra*, states the long prevailing standard actually used by all Circuit Courts of Appeals in different terms. This is a "war of words" and not of substance.

V. If, and to the extent that *McLinn* goes beyond past practice, and precedents set by this Court, it is wrong and unsound.

I. Prior to *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc) Circuit Courts of Appeal recognized the "predictive" nature of a federal district court's determination of what a state supreme court might at a later date hold state law to be, as to questions unsettled at the time the district court acted.

Beginning with *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and continuing to the present day, a federal district court, sitting on a case where its jurisdiction is predicated solely upon the diversity of citizenship of the litigants, has been charged with the duty of applying the substantive law of the forum state to all questions of law that come before it. The applicability of state law, settled or unsettled, in diversity cases, as espoused by

Erie, supra, is grounded in the notion of federalism. Mr. Justice Harlan said of the *Erie* doctrine that it is " . . . one of the cornerstones of our federalism."[1]

This task of applying state law, while never easy, is considerably less onerous where the forum state's highest court has addressed the issue, than where there is no binding precedent for the trial court to follow. In such a case of unsettled state law the district judge may not " . . . choose the rule it would adopt for itself; it must choose the rule that it believes the state's highest court, from all that is known about its methods of reaching decisions, is likely to adopt sometime in the future."[2]

The "predictive" nature of this judicial inquiry at the trial level was described by Judge Jerome Frank as "what would be the decision of reasonable, intelligent lawyers, sitting as judges of the highest (state) court, and fully conversant with (the forum state's) jurisprudence?"[3]

Mr. Justice Frankfurter, in his concurring opinion in *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 209 (1950) said that "as long as there is diversity jurisdiction, 'estimates' are necessarily all that federal courts can make in ascertaining what the state court would rule to be its law."

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[1] *Hanna v. Plumer,* 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

[2] 19 *C. Wright, A. Miller & E. Cooper,* Federal Practice and Procedure (1982) §4507 at 103.

[3] *Cooper v. American Airlines, Inc.,* 149 F.2d 355 (2d Cir. (1945).

One writer has described this predictive function as an " . . . exercise of 'fourth dimensional' reasoning".[4]

II. Recognizing this "predictive" element, Circuit Courts of Appeal historically gave deference to a district court's determination, although the standard of deference was expressed in various ways.

Prior to the Ninth Circuit decision in *Matter of McLinn,* 739 F.2d 1395 (1984), virtually all circuit courts had espoused, in one form or another, the so-called "deferential rule" or standard of review. The Third Circuit, however, appears to have adopted the de novo standard of review of state-law issues in diversity cases.[5]

The "deferential" rule is articulated in various ways but the most common expressions thereof are in terms of "great weight", "substantial deference", or "considerable deference". See, *Foreman v. Exxon Corp.,* 770 F.2d 490 (5th Cir., 1985) ("great weight"); *Goldstick v. ICM Realty,* 788 F.2d 456 (7th Cir. 1986) ("substantial deference"); *Besta v. Beneficial Loan Co. of Iowa,* 855 F.2d 532 (8th Cir. 1988) ("substantial deference"); *Duffy v. Sarault,* 892 F.2d 139 (1st Cir., 1989) ("considerable deference"). There are literally hundreds of cases that voice the rule in one form or another.[6]

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[4] Woods, *The Erie Enigma: Appellate Review of Conclusions of Law,* 26 Arizona Law Review 755, 759 (1984). The same author has prepared, in manuscript form, a reply to Professor Coenen's article which is found in 73 Minnesota Law Review 899 (1989), which he hopes to publish in the near future.

[5] See, 64 Texas Law Review 156, 158 fns. 10 & 11.

[6] For a detailed analysis of these various expressions, and a compilation of cases on a circuit-by-circuit basis, see 73 Minnesota Law Review 899, 963-1017.

The rationale for the rule, however stated, is simply the circuit court's willingness to recognize the fact that a federal trial judge, sitting in his own state, (usually following a successful career as a practicing lawyer, or trial judge in that state's judiciary, or both), is in a far better position to "divine" or "predict" or "guesstimate" how that state's supreme court will rule on an unsettled question of that state's law, than are three or more of the circuit judges, who bring to the issue no such special expertise or "feel" for a law of the state. This is otherwise stated as follows:

> "The federal courts of appeal have, until *McLinn*, always recognized the intuitive, impressionistic nature of the district judges' task; trial judges who are nurtured in a state's legal system have, more likely than not, a better "predictive feel" for the processes of the state judicial system than appeals courts who bring the cold objectivity of ignorance to the task. Thus, federal courts of appeal have historically accorded special deference to the district courts' determination of state law. If the law is clear and the district court is wrong, there is, of course, clear error. But, if there is room for doubt because of ambiguity or the absence of considered decision making in the state court, the analytic nature of the *Erie* mandate precludes a conclusion of clear error."[7]

The First Circuit, in *Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1982) said:

> " . . . we are reluctant to interfere with a reasonable construction of state law made by a

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[7] See, Woods, *The Erie Enigma; etc., supra*, note 4, at pages 759, 760 of 26 Arizona Law Review (1984).

> district judge sitting in the state, who is familiar with that state's law and practices."

This Court has itself dealt with the issue on several occasions. In *United States v. Hohri, et al*, 482 U.S. 69, 107 S.Ct. 2246 (1987) Mr. Justice Powell, in footnote 6 at page 74 of 482 U.S., aware of *In re: McLinn, supra*, for he cites that case in the same footnote, said:

> "Indeed a district judge's determination of a state law question usually is reviewed with great deference."

In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204, 76 S.Ct. 273, this court, speaking through Mr. Justice Douglas, stated the rule to be that:

> "Since the federal judge making those findings is from the Vermont Bar, we give special weight to his statement of what the Vermont law is."

Even before *Bernhardt, supra*, this Court had on other occasions dealt with the issue. In *United States v. Durham Lumber Co.*, 362 U.S. 522, 80 S. Ct. 1282, 4 L.Ed. 2nd 1371 (1960), Chief Justice Warren cited and quoted from *Propper v. Clark*, 337 U.S. 472, 486, 487, 93 L.Ed. 1480, 1492, 1493, 69 S.Ct. 1333, the language of Mr. Justice Reed in *Propper, supra*, that where "(t)he precise issue of state law involved . . . is one which has not been decided by the . . . (state) courts . . . we are hesitant to overrule decisions of federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."

In 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure (1982) at §4507, pg. 106, the authors state the rule or rationale for the rule as follows:

> "As a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts frequently have voiced reluctance to substitute their own view of the state law for that of the district judge. As a matter of judicial administration, this seems defensible."

See also, *Lindsey v. Normet*, 405 U.S. 56, 83, 92 S. Ct. 862, 879 (1971), (Mr. Justice Douglas, dissenting in part); *MacGregor v. State Mutual Life Assur. Co.*, 315 U.S. 280, 281, 62 S. Ct. 607; *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S. Ct. 1015, 1018; *General Box Co. v. U.S.*, 351 U.S. 159, 165, 169, 76 S. Ct. 728, 732, 735; *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 281, n.2, 70 S. Ct. 1184, 1189 (Mr. Justice Frankfurter, dissenting), and *Hillsborough v. Cromwell*, 326 U.S. 620, 630.

III. *Matter of McLinn, supra*, at least on a superficial reading, imports into our jurisprudence a new standard for appellate review of such district court rulings; i.e., a de novo or plenary review with no deference accorded to the lower tribunal's "prediction".

The Ninth Circuit is generally considered to be the first of the appellate courts to espouse, with great vigor, the so-called "de novo" or "plenary" review standard.[8]

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[8] But see, *Tanner Co. v. W.O.I.I., Inc.*, 528 F.2d 262 (3rd Cir., 1975).

Its opinion in *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) condemned, in no uncertain terms, what had been, up to then, the almost universal practice of Circuit Courts of Appeal to extend to district judges' determinations of unsettled state law questions varying degrees of deference. It flatly held that henceforth that that Circuit's " . . . appellate review of conclusions of state law should be under the same independent de novo standard as conclusions of federal law."[9]

It predicated that enunciation of its new procedure upon the following factors:

FIRST: Having pointed out that it (the Circuit Court) always reviews by a de novo standard district judges' determinations of federal law questions, it went on to observe,

> "There is no sound reason why we have a lesser appellate duty to the parties to make a correct, independent determination when the question is one of state law. The policy concerns supporting the de novo standard apply as well to questions of state law as to questions of federal law. The appellate function is the same in each case and the same structural advantages encourage correct legal determinations."[10]

SECOND: Relying upon its opinion in *U.S. v. McConney*, 728 F.2d 1195 (1984), (which was a criminal matter under the federal statute commonly known as the Racketeer Influenced and Corrupt Organizations Act), Judge Hug, writing for the majority in *McLinn supra*,

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[9] 739 F.2d 1395, 1403.

[10] *Id.* at 1398.

catalogs as reasons for de novo review in diversity cases involving unsettled state-law questions the fact that:

> A.) appellate judges are freer to concentrate on legal issues because they are not "encumbered" by the process of hearing evidence,[11] and
>
> B.) at least three members of the appellate panel are bought to bear in every case, thus "it stands to reason" that the risk of judicial error on law questions is minimized;[12]

THIRD: Recognizing that this Court routinely refuses to review state-law questions, the Ninth Circuit's opinion in *McLinn, supra,* ascribes this practice to " . . . the assumption (by this Court) that it need not exercise its discretionary jurisdiction to do so because the appellate panel has exercised its mandatory appellate jurisdiction by giving full and independent review to the decision of the trial judge". This leaves this Court free to conserve its discretionary powers and resources for matters of national import and policy.[13]

FOURTH: Recognizing the non-binding nature of its opinion on state law questions, the Ninth Circuit nonetheless relies on the "precedential importance" of its appellate determination of state law as a ground for de novo or plenary review of such unsettled questions in diversity cases.[14]

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[11] 739 F.2d 1395, 1398, citing *U.S. v. McConney,* 728 F.2d 1195 (9th Cir. 1984).

[12] *Id.* at 1398.

[13] *Id.* at 1399.

[14] *Id.* at 1401.

The *McLinn* court preaches that only a full-blown judicial review of every district court's determination of unsettled law in diversity cases meets the test of proper judicial review. Facially, this sounds as attractive and as American as apple pie. We submit that a careful analysis of *McLinn, supra,* shows its true character to be more like green persimmon pie.[15]

IV. In reality, *Matter of McLinn, supra,* states the long prevailing standard actually used by all Circuit Courts of Appeals in different terms. This is a "war of words" and not of substance.

The dissent in *McLinn, supra,* by Circuit Judge Schroeder, joined in by four other Circuit Judges, is one of the best arguments that can be found for rejecting the view of the *McLinn* majority. There a careful and articulate review is made of the "deferential rule" as expressed by the terms "great weight" or "substantial deference", with leading cases from the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits being cited by Judge Schroeder as examples. The key point of the dissent is aptly phrased:

> "By giving 'substantial deference,' or what I believe to be the better phrase, 'great weight,' to the decisions of the district courts, appellate courts do not suspend their own thought processes. They treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different

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[15] With apologies to Professor Woods, *supra,* fn. 4, 26 Arizona Law Review 759, at 760.

> conclusion. The circuits have not, as the majority would have us believe, been guilty of a massive 'abdication' of responsibility."[16]

The dissenters in *McLinn* correctly point out, after acknowledging the district court's special expertise in state law, that giving special consideration or weight to this factor does not mean that appellate review of such state law issues should be or will be more restrained than its review of other legal matters. As Judge Schroeder says:

> "The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or dependent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision of a state law question is a responsible exercise of appellate authority."[17]

The fact is that the *McLinn* rule of de novo review is, in reality, what happens in all cases where the circuit courts rely on the "deferential rule". As said by Judge Schroeder:

" . . . the problem . . . is basically one of terminology."[18]

The case at bar is a perfect example of how a "deferential" circuit court does in fact give a plenary review to

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[16] 739 F.2d 1395, 1404 (1984).

[17] Id. at 1406.

[18] Id. at 1495.

a district court's holding on a state law issue; in effect, giving a "de novo" review, although clothing it in "deferential" robes.

Here the circuit court carefully considered every case cited by the Petitioner in its brief to that court and differentiated each of them from the case at bar. It held that the usual rules applicable to "academia" were not appropriate here, because of the unique aspects of this case. The exact language of the circuit court is deserving of careful reading, and we have set it out in Appendix C hereto.

Only after a very careful analysis of the Petitioner's arguments did the circuit court, in this case of first impression, approve the district court's state law holding. It did, after a "de novo" review of the situation say in effect, "we can find no reversible 'error' in the district court's ruling."

The instant case, however, is not the only case which demonstrates that circuit courts do, in fact, review issues of law "de novo" while reciting the "differential" rule. When they feel the district court is wrong, they do not hesitate to say so.

In *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (1985), the Seventh Circuit, in overruling the district court's determination that under Wisconsin law, the plaintiff-appellee (cross-appellant) *Afram* was not entitled to pre-judgment interest, did not hesitate to voice the "deferential" rule ("great weight") yet it proceeded to review the issue "de novo". "We think it fairly plain that Wisconsin law allows pre-judgment interest in a case

such as this."[19] In support of this rule, it then proceeded to give a detailed explanation of the pertinent Wisconsin cases.

In *PPG Industries, Inc. v. Russell*, 887 F.2d 820 (7th Cir. 1989) the district court, in granting the defendant's motion for summary judgment in a diversity suit brought to recover damages for the defendant's alleged breach of a covenant not to sue, ruled the covenant unambiguous under the state law. Upon appeal, the 7th Circuit after saying:

> "We find ourselves in agreement with respect to the statement of these governing principles (i.e. "in applying state law in a diversity action, while mindful of our duty to review determinations of law de novo, we accord great weight to the determination of the district court sitting in the state whose law is to be applied")",[20]

went on to review the covenant at length in the light of Indiana law and held it to be ambiguous, thus declaring the district court's summary judgment ruling to be error.

Similary in *Norton v. St. Paul Fire & Marine Insurance Co.*, 902 F.2d 1355 (1990) the Eighth Circuit did not hesitate to reverse a district judge's finding that the plaintiffs' daughter's use of mobile home left the plaintiffs uninsured under a policy which specifically excluded coverage when it (the vehicle) is "used as a permanent residence". The Eighth Circuit, as did the Circuit Court in

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[19] 772 F.2d 1358, 1370 (1985).

[20] 887 F.2d 820, 823 (1989).

the *PPG Industries* case, *supra*, melded the two standards,[21] and proceeded to reverse the trial court, holding that the policies' exclusion for use as a "permanent residence" was ambiguous, as distinguished from the magistrate's ruling of it being "unambiguous".

Earlier in *Harris v. Pacific Floor Machine Manufacturing Co.*, 856 F.2d 64 (8th Cir. 1985) the Eighth Circuit, in a diversity case involving Arkansas law, held that a trial judge's refusal to give a requested jury instruction as to the meaning of the term "unreasonably dangerous" was reversible error. Here again we see a two-pronged statement of the law of appellate review.[22]

Recently in *Foster v. National Union Fire Insurance Co.*, 902 F.2d 1316 (1990), the Eighth Circuit in affirming a lower court's view of Arkansas law concerning the

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[21] 902 F.2d 1355, 1357 (1989), "In general, we accord substantial deference to a district court's interpretation of the law of the state in which it sits. (Citation omitted) We are not, however, bound by the district court's determination and will reverse if we conclude that the court has not correctly applied state law.

[22] 856 F.2d 64, 66, "In cases where the rule of decision is supplied by state law, or normal practice is to defer to the state law ruling of a district judge who sits in the state whose law is controlling (citation omitted) . . . but we think *this is one of those unusual cases where the presumption does not lead to affirmance . . . we have a definite and firm conviction that the reason given for rejecting the instruction was insufficient.*" (Emphasis supplied.) See also, *Bennett v Allstate Insurance*, 889 F.2d 776, 779 (8th Cir. 1989).

liability of the defendant to the plaintiffs under a fidelity bond again makes use of the "merged" rule.[23]

As we have remarked earlier, the "deferential" rule is really judicial shorthand – allowing courts of appeal to avoid the useless expenditure of precious time and energy, when a careful review leaves the court satisfied that the district judge did not commit reversible error. Not being judicial slaves, nor as Judge Frank said in a different legal context, but still arising out of *Erie*, not being required "to play the role of ventriloquist's dummy",[24] circuit court judges do not blindly accept every district court judge's determination of unsettled state law questions in diversity cases. Because they rely on the "deferential" rule to avoid writing unnecessary legal opinions which simply 'gild and lily', and affirm otherwise clearly correct lower court rulings, does not mean that when, after appropriate briefing, oral argument, study and reflection, they conclude the trial judge to be in error that they cringe from the task of taking pen in hand and laboriously crafting an opinion which cogently and clearly sets forth the erroneous ways of the lower tribunal.

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[23] 902 F.2d 1316, 1318 (1990), " . . . we note that while there is not a decision interpreting the statute in question by the Supreme Court of Arkansas, the district judge is a former member of that court. Her judgment on the matter is due considerable weight. We have not, however, failed to closely examine the matter ourselves."

[24] *Richardson v. Comm. of Int. Rev.*, 126 F.2d 562, 567 (2d Cir. 1942).

This war of words – "de novo", "plenary", "deference", "great weight", "firm conviction of error", – is just that. In reality all circuits do in fact give appropriate and meaningful review to all issues that come before them. To hold otherwise is to ascribe to dedicated jurists a lack of appreciation for their lofty and responsible positions in our judicial system. The Petitioner may subscribe to that theory,[25] but the Respondent, and her counsel, disassociate and distance themselves from that position.

V. If, and to the extent that *McLinn* goes beyond past practice, and precedents set by this Court, it is wrong and unsound.

A. The *McLinn* court's reliance upon *Runyon*[26] and *Butner*[27] is misplaced, and this mistake let it into error into requiring "de novo" review of state law issues in every diversity case.

The *McLinn* court in attempting to use *Runyon* as a predicate for its proposition that this Court refrains from reviewing unsettled state law questions raised in diversity cases in reliance upon a circuit court's having given "full and independent review to the decision of the trial judge"[28] in reality builds a straw man and then proceeds to knock it down. *Runyon* is not an *Erie* case. *Runyon* is a civil rights case in which the trial court "borrowed" a state statute of limitations and held the petitioners' claim

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[25] See Petitioner's Brief on Merits, pages 26 & 27 for a familiar rendition of this argument.

[26] *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586 (1976).

[27] *Butner v. U.S.*, 440 U.S. 48, 99 S.Ct. 914 (1979).

[28] *Matter of McLinn*, 738 F.2d 1395, 1399 (9th Cir. 1984).

for damages barred thereby. This Court, after noting that had Congress set an applicable limitations statute that such would control the case, went on to hold that since Congress was silent in this regard, such silence is interpreted to mean that it is federal policy to adopt the local law of limitations. The Circuit Court had affirmed the lower court ruling, and this Court in reaffirming that action, stated that you have " . . . accepted the interpretation of state law in which the *District Court* and the *Court of Appeals have concurred* (emphasis by the *McLinn* court), even if an examination of the state law issue without such guidance might have justified a different conclusion".[29] The context of *Runyon* makes it clear that the question before the *McLinn* court was not and could not have been before this Court for decision in *Runyon*. The fact that *Runyon* is not an *Erie* case, with none of the judicial policy overtones of *Erie* applicable, demonstrates the irrelevancy of the quoted language about District Court and Circuit Court concurrence as to the question now presented.

Butner, supra, just as *Runyon,* is not an *Erie* case. There the Court made it clear that the issue was not whether the Court of Appeals had correctly applied North Carolina law, but rather what was the proper interpretation to be given to federal statutes concerned with the administration of bankrupt estates. In just so many words this Court said that its purpose in *Butner* was to resolve a conflict

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[29] *Runyon, supra,* p. 181; citing *Bishop v. Wood,* 426 U.S. 341, 346, and n. 10 (1976).

between circuits concerning the right approach to a dispute of this kind (i.e. a dispute involving a federal statute governing bankrupt estates).

In *Butner* the Court of Appeals by a 2 to 1 decision, reinstated a bankruptcy judge's holding which had been reversed by the district court. The pivotal question in *Butner* was whether property interests in rents collected by a trustee in a bankruptcy proceeding should be adjudicated by the application of state law (as held by a majority of the Circuit Courts of Appeals) or by the application of a federal rule of equity (as espoused by a minority of the Circuit Courts of Appeals). It was this question of federal law that this Court addressed in *Butner*. That this Court was not dealing in *Butner* with the issue before the *McLinn* court is clear from the language used by this Court. After noting that the parties had dealt at great length with the state law question, Mr. Justice Stevens, speaking for a unanimous Court said at page 58 of 440 U.S.:

> "We decline to review the state law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."

That language is not, we submit, supportive of the interpretation made of it by the *McLinn* court. At page 1399 of 739 F.2d Judge Hug, and his confreres, concludes that this Court, by the quoted language, is not giving weight or deference to the decision or opinion of either the district court or circuit court, but rather "simply not reviewing the state law question that has been fully

reviewed and determined by the intermediate appellate court." Nowhere in the quoted *Butner* language is there any inference to or implication of a full review of a state law question by either court, district or circuit. This Court's statement is simple and straight forward – "federal judges . . . in their respective districts and circuits are in a better position – etc., etc."

The only fair reading of the quoted *Butner* language is simply that this Court will not review state law questions. Nothing more – nothing less. *Butner*, a non-*Erie* case, is hardly supportive of the tortured interpretation given it by the *McLinn* court. The comment by Judge Hug to the effect that implicit in this Court's practice of not reviewing state law questions is an assumption of full and independent review by the intermediate appellate court finds no support in either *Runyon* or *Butner* that would make any such comment applicable or appropriate to an *Erie* case, in which it is the duty of the lower courts to "divine" or "predict" how a state supreme court would rule on the same issue at a later date. Both *Runyon* and *Butner* are at best irrelevant to an *Erie*-type diversity case such as the *McLinn* case or the case at bar.

The *McLinn* court in reading *Runyon* as a case which holds this Court's deference to lower court rulings on state law questions to be predicated upon full review and affirmance or reversal by the intermediate appellate court as distinguished from deference to a district court's decision, cites *Bishop v. Wood*, 426 U.S. 341, 347 and Note 10. It is, we submit, significant that the *McLinn* court did not discuss the *Bishop* case nor make any analysis of this Court's opinion therein. Just as neither *Runyon* nor *Butner* are *Erie* cases, *Bishop* is not a case controlled by the *Erie*

doctrine, nor the policy considerations implicit and explicit therein. It is a case, however, which is most meaningful in the area of deference to be given to "experience" in local law and the intuitive nature of the "prediction" process that must take place in *Erie* cases. *Bishop* involved a police officer who alleged he had been wrongfully dismissed by municipal officials without a hearing. The ordinance controlling the plaintiff's employment was construed by the district court to make the officer an employee at will. The Fourth Circuit Court of Appeals, initially affirmed the district court by a two-to-one decision.[30] Then, after an *en banc* hearing, it reaffirmed the district court, without opinion, by an equally divided court. The issue in *Bishop* was essentially a constitutional one of due process arising out of the state law question as to the proper interpretation of the applicable employment ordinance of the City of Marion, North Carolina. After commenting that the ordinance in question was reasonably susceptible of two interpretations, one guaranteeing the officer's continued employment, and the other not granting such a guarantee, and, after observing that there was no authoritative interpretation by a North Carolina state court, this Court remarked that it had the opinion of the district judge "who, of course, sits in North Carolina and practiced law there for many years. *Based upon his understanding of state law*, he *concluded* that the petitioner held his position at the will and pleasure of the city."[31] (Emphasis added.) This Court went on to refer to the fact of reaffirmance by an evenly divided Fourth Circuit

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[30] 498 F.2d 1341 (4th Cir. 1974).

[31] 426 U.S. 341, 345, 96 S.Ct. 2074, 2078 (1976).

Court, without opinion, and then said *"in comparable circumstances,* this Court has accepted the interpretations of state law in which the district court and the court of appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion."[32]

We set out in Appendix D hereto this Court's footnote 10 as appended by the Court at this point in its Opinion in *Bishop.*

This Court used the words "in comparable circumstances", and there it was referring to the fact that it had a district court judge's opinion and a reaffirmance thereof by an evenly divided court of appeals, without opinion.

We respectfully submit that none of the cases decided by this Court, and cited by the *McLinn* court, support its proposition that this Court defers on matters of state law in reliance upon a de novo review of the district court's interpretation thereof by a circuit court. On the contrary, those cases which are in point,[33] teach that such reluctance to expound on unsettled state law is grounded in the same rationale that causes circuit courts to defer to district court, i.e., (i) a recognition of the "predictive" nature of the task; and (ii) an awareness of the district judge's familiarity with local practice and law.

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[32] Id. at 346; 2078.

[33] See, Section II hereof, *supra,* and cases cited therein.

B. *McLinn, supra,* notwithstanding, a majority of the Circuit Courts of Appeal still follow the "deferential rule".

We have earlier commented upon the superficial appeal of *McLinn, supra,* as it seems to echo the innate American sense of fair play. A majority of Circuit Courts of Appeals have not accepted this pronouncement of appellate review, which is novel indeed, at least to the extent that it requires a full and complete legal analysis of each issue of state law in diversity cases by them. We cite just a few of the more recent cases from different circuits that still espouse and adhere to the oft-but-variously-stated rule of "deference".

FIRST CIRCUIT

Croteau v. Olin Corp., 884 F.2d 45, 46 (1989); " . . . one who chooses to litigate his state action in the federal forum . . . must ordinarily accept the federal court's reasonable interpretation of extant state law . . . an interpretation to which we owe some deference."

SECOND CIRCUIT

Ewing v. Ruml, 892 F.2d 168, 171 (1989); "Where, as here, the interpretation of state law is made by a district judge sitting in that state, it is entitled to great weight and should not be reversed unless it is clearly wrong."

FIFTH CIRCUIT

1. *In Re: Fox,* 902 F.2d 411, 413 (1990); "On issues of state law, we ordinarily give considerable weight to the

opinion of lower court judges who sit in the state and have practiced before its courts and are therefore more familiar with local law."

2. *Finch Equipment Corp. v. Frieden*, 901 F.2d 665, 667 (1990); " . . . we observe that this court gives deference to the district court's interpretation of state law."

3. *Matter of Hyde*, 901 F.2d 57, 59 (1990); "In cases raising unsettled questions of state law, the district court is entitled to substantial deference in its 'determination of the law of the State in which it sits'."

See also *Belliache v. Fru-Con Construction Corp.*, 866 F.2d 798, 799 (1988); *Mitchell v. Random House, Inc.*, 865 F.2d 664, 668 (1988).

SIXTH CIRCUIT

1. *Self v. Wal-Mart Stores, Inc.*, 885 F.2d 336, 339 (1989); "Our opinion in Gibson teaches that we should give considerable weight to the trial court's views on such questions of local law."

2. *Diggs v. Pepsi Cola Metropolitan Bottling Co.*, 861 F.2d 914, 927 (1988); "Our court has consistently held that the judgment of a local district judge sitting in a diversity case, as to the application of state law, is entitled to considerable deference."

SEVENTH CIRCUIT

PPG Industries, Inc. v. Russell, 887 F.2d 820, 823 (1989); " . . . we accord great weight to the determination of the

district court sitting in the state whose law is to be applied."

See also *Afram Export Corp. v. Matallurgiki, Halyps, S.A.*, 772 F.2d 1358, 1370 (1985).

EIGHTH CIRCUIT

Norton v. St. Paul Fire & Marine Insurance Co., 902 F.2d 1355, 1357 (1990); "In general, we accord substantial deference to a district court's interpretation of the law of the State in which it sits. (citation omitted). We are not, however, bound by the district court's determination and will reverse if we conclude if the court has not correctly applied state law."

See also *Foster v. National Union Fire Insurance Co.*, 902 F.2d 1316, 1318 (1990), *supra; Bennett v. Allstate Insurance Co.*, 889 F.2d 776, 779 (1989), *supra; Modern Leasing Inc. v. Falcon Manufacturing of California*, 888 F.2d 59, 62 (1989); *Luke for Luke v. Bowen*, 868 F.2d 974, 997 (1989); *Harris v. Pacific Floor Machine Manufacturing Co.*, 856 F.2d 64, 67 (1988), *supra*.[34]

TENTH CIRCUIT

Weiss v. U.S., 787 F.2d 518, 525 (1986); "Generally, we apply the clearly erroneous standard in reviewing a

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[34] See Section IV, *supra*, for our position that these 7th and 8th Circuit cases represent a melding of the "de novo" and "deferential" rules, which allows the deference standard to be used as "judicial shorthand" where affirmance is called for, and prescribes a plenary review when the court has a "firm conviction" that the district court was in error.

district court's grant of summary judgment on a legal question upon which the state's highest court has not ruled."

We respectfully submit that it is clear beyond question that *McLinn, supra,* notwithstanding, many of our Circuit Courts of Appeals have continued to espouse the deferential rule. The rationale, and the appropriateness, of this espousal is founded in the *Erie* doctrines of *federalism, uniformity,* and *discouragement of forum shopping,* and supported by the common sense recognition of the "predictive" nature of the district court's task and the acknowledgment of his "expertise" in local law, as distinguished from the circuit judges lack of familiarity with the peculiarities of individual state holdings.

C. To the extent that *McLinn* requires a written opinion of each Circuit Court of Appeals ruling on questions of unsettled state law passed upon by the district court in the trial of diversity cases, it is wrong, unsound, and sets bad jurisprudential policy.

1. Accepting, arguendo, that *McLinn* represents a departure from established appellate practice in all circuits, it is wrong and unsound.

a. The policy considerations of *McLinn* majority and minority.

The Majority.

1. The policy that every party is entitled to a "full, considered, and impartial review of the decision of the trial court",[35] is applicable as much to a state law question as a federal law question.

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[35] 739 F.2d 1395, 1398 (1984).

2. The structural differences between the district court and circuit courts mandate de novo or plenary review of such unsettled state law questions, since appellate courts are better suited to consider questions of law.

3. The precedential value of a circuit court opinion requires a full and careful analysis of each such state law question.

The Minority.

1. The "predictive" nature of the trial court's function when faced with an unsettled state law question in a diversity case justifies the "deferential" rule.

2. The "deferential rule" does not interfere with the circuit court fulfilling its responsibility to give appellants a meaningful review of the district court's determination of such questions.

3. The *McLinn* majority's "de novo" of "plenary" standard of review will result in an inordinate increase of the workload of appellate courts without a compensating or corresponding increase in either legal accuracy or efficiency.

b. The *McLinn* policy considerations analyzed:

The Majority.

1. The *McLinn* holding that a "full, considered, and impartial review" is as necessary in state law questions in diversity cases as it is in federal law cases, fails to take into account the very special and significant duties imposed on the trial court by *Erie, supra,* in such cases.

Under *Erie* the trial court is charged with the responsibility of maintaining the very delicate balance between the federal government on the one hand and the states on the other.[36] The trial judge is not interpreting a federal statute or applying federal case law, where by statute the parties have a right of appeal subject to ultimate review by this Court. In diversity cases, he must fathom out how a state supreme court will rule on the issue at a later date. The factors of "forum-shopping" and "uniformity" usually associated with *Erie* are not the only considerations. The doctrine of "federalism" is significant in the trial judge's role in a diversity case. The *McLinn* court did not deal with this in any manner. We submit that a proper analysis of the appellate court's function in a diversity case requires some recognition of this principle. It does not follow, as night follows day, that because there is a right of appeal in diversity cases, that this right is coextensive with the right of appeal in "federal law" cases, even though the Ninth Circuit says so. The doctrine of "federalism" and the "predictive" nature of the trial judge's role militate against any such equality of review. As we note later, the fact is that there is no "correct answer" to such unsettled state law questions within the federal judiciary. The Circuit Court of Appeals and this Court notwithstanding, it is the state supreme court (or legislature) that has the last word.

2. The *McLinn* court relies heavily upon its earlier opinion in *U.S. v. McConney*, 728 F.2d 1195 at 1201-1204 (9th Cir.1984) (en banc) in discussing the structural differences between the district court and circuit court.[37] Those

[36] See, *Hanna v. Plumer*, 380 U.S. 460 (1965, *supra*, n 1).

[37] 739 F.2d at 1398.

differences are clear and unequivocal, but beside the point, insofar as the question now at bar is concerned. In federal law question cases (and please note that *McConney* is such a federal criminal law matter involving the issue of how to review a mixed question of law and fact), the distinction between the courts is obvious and the rules of review well-established, i.e., review of pure facts is limited by Federal Rule of Civil Procedure 52(a) to the "clearly erroneous" standard; law questions are subject to "de novo" or "plenary" review. *McConney*, relying on *Pullman Standard v. Swint*, 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 1790 n. 19, 72 L.Ed.2d 66 (1982) held the de novo standard applicable to mixed questions. While, as to facts, the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) is equally applicable to diversity cases and federal cases, the review standards applicable to law questions are not, for several reasons. First, there is no "right" or "correct" answer to an unsettled state law question within the federal system. Secondly, there is no reason to conclude that, even assuming that three circuit judges are better able to concentrate on legal issues than is the trial judge, that they are any better able to "predict" or "guesstimate" how the state supreme court or legislature will rule or act at a later date, than is the local trial judge, who obviously is in as good, if not a better, position to so "divine".

3. The *McLinn* court's exposition of the "precedential importance"[38] of its opinions as to unsettled state law questions in diversity cases is in error. Of necessity the *McLinn* court recognized that its opinions as to state law

[38] 739 F.2 1395, 1401 (9th Cir., 1984).

questions are not binding precedent,[39] yet it felt they are "of precedential importance". The majority went on to postulate that since *Erie* espoused the virtue of "uniformity", then "uniformity among federal interpretations of state law tends to create state-federal uniformity."[40] Implicit in this statement is the concept that in some fashion later state court rulings on such unsettled state law questions will be influenced by the opinions of the circuit courts of appeal. In effect, the circuit courts would then be fashioning "federal common law" – what the circuit judges think the law "ought to be", rather than predicting how the state court would later rule. *Swift* v. *Tyson*,[41] revisited; the phoenix of old rises from the ashes of *Erie*. The mere fact that pending some definitive ruling by a state supreme court on a subject of unsettled state law, some other court might cite a circuit court's "predictive" view of that event is hardly a sound reason for rejecting the "deferential rule" which is in reality grounded in solid common sense and a recognition of the trial court's superior predictive ability.

There have been numerous instances where a state supreme court has later ruled contrary to the decisions of the circuit courts of appeal. In fact, in many of these cases, the state supreme court, has, in reality, adopted a rule which had previously been adopted by the lower district court and reversed by the circuit court of appeals. For an interesting comment in this regard, see the opinion of Judge Brown (concurring) in *United Service Life*

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[39] *Id.*

[40] *Id.*

[41] 41 U.S. (26 Per.) 1 (1842)

Insurance Co. v. Delaney, 328 F.2d 483, 486 (5th Cir.), cert. den. 377 U.S. 935 (1964).[42] The transient nature of decisions by federal circuit courts of appeal on unsettled state law questions is characterized by the same Judge Brown in the same *Delaney* case, *supra*, in such graphic terms that it bears repeating here.

> "The law announced by us becomes the law of the Medes and Persians which altereth not until the state authoratively declares the law to be otherwise. When subsequent state declaration is made, our former opinion evaporates as though it never existed. The Moving Finger writes, and having writ, moves on. But it may be that having written, what we write is soon erased."

2. The *McLinn* "de novo" review standard is unmanageable and unworkable as an instrument of effective and efficient judicial administration.

The core question in the case at bar is whether the Constitution, as it is reflected in *Erie*, demands that Circuit Courts of Appeal adopt a standard of appellate review that requires them to use their ever-dwindling judicial manpower and resources to fashion opinions on

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[42] "Though our decisions survive the discretionary review of certiorari, most of the time because they are really not "certworthy", . . . many of them do not fare so well when they are tested in the place that really counts – the highest, or first writing court, of the state concerned . . . Within the very recent past both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering."

unsettled state law questions in cases where only the parties before the court are bound, and where those hard wrought views are of little or no precedential value.

To answer this question fairly, requires a brief analysis of the process by which these issues of unsettled state law come before those circuit courts. In the first instance, we are dealing with diversity of citizenship cases in which, by *Erie*, substantive state law is controlling. Where the state's supreme, or highest, court has ruled on the legal issue or where the state legislature has spoken by way of a controlling statute, the answer is clear. If per chance the trial court mistakenly applies the law or statute then the circuit court, will, even under the so-called "deferential rule", reverse. It is in those cases where a question of state law is unclear that the trial judge must use its "lawyers intuition" "instinct" "experience", or "feel" to arrive at a prediction of what the state law will be declared to be by the state supreme court or legislature at a later date. Practicing trial lawyers do this frequently; trial judges do it just as often, if not more frequently. The task simply "goes with the territory". The loser of that prediction is usually the one who wants a "second bite" of the apple, in the hope that the green persimmon has somehow become a MacIntosh. We submit that unless and until the loser makes some convincing showing that the trial judge's "prediction" was clearly wrong, that its determination should stand. The circuit court is in no better position to "predict" than is the trial judge. In fact, we have demonstrated, supra, that in reality it is the trial judge who usually makes the better prognosticator.

In every case that comes before the Circuit Court of Appeals the parties have briefed these questions of unsettled state law, presenting their views of why the trial judge was right or wrong, depending upon their respective positions as appellant or appellee. At oral argument they have further expounded upon the accuracy or poor marksmanship of the trial court. The circuit judges on the appellate panel have questioned counsel carefully about various points that seem troublesome or unclear to them. Finally, while we have no personal knowledge of what goes on behind the scenes, in conferences or private discussion between and among the judges and their law clerks, we have no hesitancy in proposing the proposition that, in fact, serious consideration is given to each and every argument presented by the parties. To contend otherwise would be outrageous. In point of fact, it is clear, in the case at bar, that the circuit court did decide that the trial judges' view of the doctrine of substantial performance was not impermissible or unreasonable, and truly sound as a matter of general contract law. In fact, they reached that conclusion de novo through the "in chambers" process and then, using the "deferential rule" affirmed the district court's prediction of what the Rhode Island Supreme Court would do if faced with the case at bar.

This is sound use of judicial manpower and resources. This case binds only the parties. It is of no particular precedential value since, as a matter of accepted law, the Rhode Island Supreme Court could tomorrow hold to the contrary, and all Rhode Island litigation would thereafter be bound thereby. To require the circuit court to perform, as the Petitioner would

require,[43] would be to impose a too heavy burden on an already otherwise overburdened judiciary in circumstances where such is of little moment to anyone but the parties, who already have had a fair and impartial trial and an opportunity to demonstrate the erroneous ways of the trial judge. Were this Court to impose such a standard and time-consuming process as contended for by the Petitioner, the burden upon our federal judiciary would be awesome indeed.[44]

Not every issue that comes before a trial judge requires or justifies any such detailed analysis or exposition. A heart/lung resuscitator is not required to treat the common cold, and not every issue of unsettled state law that arises in the trial of a diversity case demands (nor do the exigencies of orderly trial procedure allow) such a sweeping legal analysis. But even assuming that the trial judge may have given the issue less review and analysis than a party may think it should have, such a detailed written opinion, canvassing all the various sources cited by the Petitioner as appropriate resource material, should not be required of the circuit court unless the complaining party makes out a pretty fair case that the district court fell into substantial and important error. The "de

[43] See page 21 of Petitioner's Petition for Certiorari for a full recitation of the materials to be convassed and dealt with by the trial court before it may "predict" how a state supreme court will rule at a later date.

[44] Even the Ninth Circuit in *U.S. v. McConney*, 728 F.2d 1195, 1201, n. 7 says "It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources than does application of the clearly erroneous standard."

novo" standard of the *McLinn* majority requires no such showing of injury or error. Under *McLinn*, each and every case, including each and every issue of unsettled law, is automatically and without exception subjected to such careful scrutiny, review and decision writing. The effect of such a standard will be, as Judge Schroeder predicted in *McLinn*,[45] to encourage appeals, increase remands, retrials and post-remand appeals, all in cases of no true precedential value, and where, if the issue is basically one of fact (such as in the case at bar – did the plaintiff in fact 'substantially perform' her contract), the final result will probably be the same as it was at the original trial.

CONCLUSION

The "deferential rule", in whatever terms it may be described, i.e., "great weight", "substantial deference", and the like, is by far the traditional standard applied by Circuit Courts of Appeals when reviewing unsettled questions of state law as determined by the trial judge in diversity cases. This standard admirably comports with the aims and goals of the doctrine of "federalism" as embodied in *Erie*, for it recognizes the "fourth dimensional" or "predictive nature" of the task faced by trial judges in resolving those issues. It allows the circuit courts to give a meaningful review of those determinations without the necessity of writing long involved opinions that do nothing more than affirm the district court

[45] 739 F.2d 1395, 1406 " . . . the majority signals to litigants that reversals will be easier to obtain, thus encouraging more appeals.

and set no significant or important precedents. As noted these opinions are neither binding upon, nor instructive to, lower courts in other cases. To require such "de novo" review, in each and every diversity case of each and every issue of unsettled state law, violates the spirit of *Erie* in that:

First: It encourages circuit courts to substitute their "prediction" of state law for that of the district court, when in reality the district court judge is in as good, if not better, position to so "divine";

Second: It leads to the creation of "federal common law" – law as the circuit judges think it ought to be – rather than recognizing that the ultimate determination of state common law belongs with state courts;

Third: It encourages appeals by unsuccessful litigants by engendering the hope of easier reversal, leading then to a proliferation of remands, retrials and post-remand appeals;

Fourth: It promotes rather than restricts forum shopping by leading litigants to seek out jurisdiction of their claims in the forum which has not spoken to an issue, if the other has ruled adversely; and

Fifth: The requirement of "plenary" review without any requirement that the appellant demonstrate, with some degree of certainty, that the trial judge committed substantial, important and/or clear error, places an inordinate and too-burdensome task upon circuit courts that already suffer from lack of manpower, lack of judicial resources, and heavy and growing dockets.

For the reasons stated this Court should affirm the Judgment of the United States Court of Appeals for the First Circuit in the case at bar.

Respectfully submitted,

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APPENDIX A

(p. 7) I. This is not a case of student vs. academia.

In reviewing the case at bar it is necessary, in the first instance, to have in mind at all times, the precise nature of the "contract between the parties". We do not have here the usual situation of a contract, implied in law, from the usual documents of an application for admission, college or university handbooks which set forth academic standards to be achieved and/or maintained, disciplinary rules and regulations to be adhered to, and the simple payment of fees and expenses. Here the "contract" by action of the parties has become unique and special. The document of December 18, 1984, Respondent's Exhibit 38 (set out in Petitioner's Appendix to its Petition herein) renders the contract between the parties something special, or "one of a kind". Even the Petitioner's Dean of Nursing agrees that the December 18, 1984 "contract" was special. At Appendix Vol. II, p. 709a, we find the following:

> "Q Dean Graziano, how many students have you entered into a weight loss contract with?
>
> A I don't recall.
>
> Q Anyone ever than Sharon?
>
> A No, I don't believe so.
>
> Q So that this is a unique document, is it not?
>
> A Yes, it is.
>
> Q Not duplicated neither before nor since.
>
> (p. 8) A Not that I can recall."

The Trial Justice found the instant contract 'special' when on April 14, 1989 (Trial day No. 7) he said at App. Vol. II, page 891a:

> "This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties."

We are therefore dealing, not with the usual case of a student complaining of a failing grade or one accused of some disciplinary infraction such as "cheating". Rather, we are dealing with an honor student who failed to lose as much weight as she promised she would do over a given period of time. Quite a different thing than a flunking medical or law student, or one who has deliberately cheated on an examination or plagerized his or her thesis or a test essay. We are involved with a most unique situation – one for which we have been unable to find a precedent, although we have "searched the books high and low" for guidance. The invasion by the College and its faculty into the Respondent's private life is the distinguishing factor in this litigation.

II. The doctrine of substantial performance was correctly applied to the case at bar.

We recognize that the question of whether the doctrine of substantial performance was correctly applied to the case at bar by the trial justice is not technically before the Court on the instant Petition. However, the approval

(p. 9) thereof by the Circuit Court of Appeals is questioned by the Petitioner, insofar as it complains that the Circuit Court did not give the question plenary view.

In its "Summary" on Page 11 of its Petition, the Petitioner alleges that the District Court "created a novel and highly troubling rule of State law" in the face of relevant decisions of the Rhode Island Supreme Court. At pages 21 and 22 of its Petition, we learn that in its view, the Rhode Island Supreme Court has in the case of *National Chain Co. v. Campbell*, 482 A.2d 132 (R.I. 1985) and *Ferris v. Mann*, 99 R.I. 630, 210 A.2d 121 (1965) "long limited the application of the doctrine of 'substantial performance' to construction contract cases". Nothing in either of those cases, which admittedly are construction cases, limits the application of the doctrine to building contracts. The Rhode Island Supreme Court has not declared itself as to the doctrine's applicability to other classes of cases. There is nothing in any reported Rhode Island Supreme Court case which can be construed as indicating that that Court would do other than follow the general trend throughout the country and hold the principle to be controlling in a broad range of situations. As said in 17 Am. Jur. 2d Contracts §375 pp. 819 and 820:

> "While the doctrine of substantial performance is applied most frequently in building and construction contracts, it is not so limited and may be applied in the case of any kind of contractual obligation to perform."

In *Division of Labor Law Enforcement v. Ryan Aeronautical Co.*, 106 Cal. App. 2d Supp. 833, 236 P.2d 236, 30 A.L.R.2d 347 (1951), an employee, who had worked all but 8 days of a required full year of employment under a

(p. 10) collective bargaining agreement that called for vacation pay after "completion of a year's service", and whose employment was terminated without fault on his part, as a part of employer's reduction of work force for economic reasons, was held, by the application of the doctrine of specific performance, to be entitled to the vacation pay. There the California Appellate Department of Superior Court said, at page 350 A.L.R. 2d:

> "Substantial compliance, it has been said, meets the requirements of *any obligation* and what acts may constitute a compliance sufficient to meet the requirements of the law is a question to be determined on the facts in each individual case." (Emphasis supplied).

The respondent argues vigorously that the doctrine of substantial performance is not, or at least in its view of things should not be, applicable to the case at bar. Respondent has been assiduous and repetitive in espousing the position that only complete and precise compliance with every single facet "between the parties" is necessary before the Respondent can have relief. It goes on at great length about the necessity of institutions of higher learning having academic freedom to preserve their high and lofty goals and the ability to protect the integrity of the degree system and even in turn to thus protect the public from unqualified and unscrupulous graduates going about pandering their deficient knowledge and training. All of that very laudable position is wholly beside the point in this case. Every case cited by the Petitioner in its Petition in support of its position in the case at bar are cases involving questions of academic qualification and/or disciplinary measures or matters

involving breach of an honor code or dishonesty violations of one type or another.

(p. 11) *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975) was a simple case of academic dishonesty. The issue of how to interpret a "special" or "unique" contract between the school and pupil was not involved. Here Dean Graziano agreed that the "contract" with Sharon was "unique".

Sofair v. State University of N.Y., 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), as do so many of the cases, deals with an academic failure of a medical student. *Olsson v. Board of Higher Education*, 49 NY 2d 408, 402 NE2d 1150, 426 N.Y. Supp. 2d 248 (1980) falls into the same category of evaluating a student's academic qualifications.

Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) again deals with academia and not a special or unique contract. *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988) is another academic qualification case and does not in any way deal with a special or unique addendum to the usual student-institutional relationship.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507 (1985) involved a student who was dismissed for failing an important written examination. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948 (1978) dealt with a student who had been dismissed for failure to meet academic standards. *Clayton v. Trustees of Princeton University*, 608 F.Supp. 413 (D. N.J. 1985) involved a case of a student cheating on an examination which constituted a breach of a student's honor code."

Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977) cert. den. 435 U.S. 971 (1978), was similarly a case arising out of a straight academic failure. It centered (p. 12) about the issue whether a three-member "appeals committee" recommendation to change a failing grade was binding on the Dean of the Nursing Department. There the Circuit Court reversed a finding by the District Court that the College had breached its agreement with the student when the Dean rejected the "recommendation". As in so many other cases cited by the Petitioner, the Court was there dealing with an academic failure.

The Trial Justice on three (3) separate occasions dealt with the doctrine and its application to the case at bar. His bench decisions at the conclusion of the Respondent's case; at the end of the Petitioner's case; and his charge to the jury in that regard are set out in Appendix A hereto. He properly applied the doctrine to the instant case.

APPENDIX B

Bench Comments of Trial Justice
Re: Substantial Performance

At the conclusion of the Plaintiff's case he said at page 92 of the transcript for April 11, 1989 (Trial Day #4) (App. Vol. I p. 523a):

> "It is a very important doctrine in the law of the State of Rhode Island. If the jury can say that the Plaintiff substantially performed her contractual obligations to the college, then they can say that she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under this side agreement, then the jury can determine that the college justifiably dismissed her from the program.
>
> Neither side has talked about substantial performance to this point, but I would expect that they would give me some request for instructions at the appropriate time on that subject."

At the end of the defendants' case on April 14, 1989, he said at pages 13, 14 and 15 of the transcript for that day (Trial Day #7) (App. Vol. II p. 820a):

> "THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine whether the Supreme Court of Rhode Island if

faced with this case would decide whether the doctrine of substantial performance would apply."

" . . . I am satisfied in my own mind that if the Supreme Court of Rhode Island has this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for. So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury."

Finally for a third time the District Court gave voice to these principles when he charged the jury on April 14 as follows: (Taken from pages 84 and 85 of the transcript of Trial Day 37) (App. Vol. II, pp. 891a & 892a):

"This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties.

Whatever view you take of the evidence, it is clear that Sharon Russell was in danger of receiving an unsatisfactory grade in her clinical course taken that fall, the medical and surgical clinical course, whose teacher was Mary Lavin. Rather than have her get an unsatisfactory in that course, it was determined by both sides that she would receive a satisfactory grade if she made the agreements contained in that written contract. The contract was signed by the plaintiff and obviously agreed to by the college through Dean Graziano, and that became a binding contract as part of the overall contractual relationship between Sharon Russell and Salve Regina College.

It is clear and undisputed that on August 21, 1985, Sharon Russell was dismissed from the nursing program because the college through its agents, Graziano and Chapdelaine, asserted that Sharon Russell had not complied with the terms of the contract.

So bringing this case down to its very simplest terms, in order for the plaintiff to recover in this case, the plaintiff must prove to you by a fair preponderance of the evidence that on August 21, 1985, she was wrongfully dismissed from the nursing program.

In order to prove that she was wrongfully dismissed from the nursing program at the time, she has to prove that she performed her obligation, and all obligations, actually, under the contract that she had, with the college, the whole contract. There is no dispute in this case that she performed adequately academically, and to that point she had a passing grade in everything, had maintained the point average that was required, that she had complied with all the rules and regulations and policies of the college, and therefore, the case comes down to the point

of whether she had complied with this special agreement of December 18, 1984.

The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

Whether there has been substantial performance of a contract in any particular circumstance is a question of fact for you, the jury, to determine."

APPENDIX C

After analyzing the cases cited by the Petitioner in support of its position that the doctrine of substantial performance should not apply to the case at bar, the Circuit Court proceeded to differentiate the instant case from those so cited, and said:

> "The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action."

APPENDIX D

10. See *United States v. Durham Lumber Co.*, 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed.2d 1371. In *Propper v. Clark*, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1341-1342, 93 L.Ed. 1480, the Court stated: "The precise issue of state law involved, *i. e.*, whether the temporary receiver under § 977-b of the New York Civil Practice Act is vested with title by virtue of his appointment, is one which has not been decided by the New York courts. Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions were shown to be unreasonable." In *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630, 66 S.Ct. 445, 451, 90 L.Ed. 358, the Court stated: "Petitioner makes an extended argument to the effect that *Duke Power Co. [v. State Board*, 129 N.J.L. 449, 30 A.2d 416; 131 N.J.L. 275, 36 A.2d 201,] is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.' *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of *Duke Power Co. v. State Board*, which involved closely analogous facts." And in *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281, 62 S.Ct. 607, 86 L.Ed. 846, the Court stated: "No decision of the Supreme Court of Michigan, or of any

other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

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(6)

No. 89-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SALVE REGINA COLLEGE,
PETITIONER

v.

SHARON L. RUSSELL,
RESPONDENT

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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---

MOTION FOR LEAVE TO FILE BRIEF FOR THE FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Rule 37.4 of the Rules of this Court, the Ford Motor Company ("Ford") moves for leave to file the accompanying brief *amicus curiae* in support of respondent. Respondent has consented to the filing of this brief, but counsel for petitioner has not responded to Ford's request for consent.

Ford's interest in this case arises from the fact that it intends to file a petition for a writ of certiorari to review the judgment of the court of appeals in *Ford Motor Co.*

v. *Mahne*, 900 F.2d 83 (6th Cir. 1990). *Mahne* is a product liability action arising out of a 1985 automobile accident that occurred in Florida between Florida residents driving Florida-registered cars. The plaintiff sued first in Michigan state court, but that court dismissed on *forum non conveniens* grounds. She then sued in Florida state court, but voluntarily dismissed the suit after Ford pointed out that it was barred by Florida's 12-year statute of repose. Finally, she sued in federal district court in Michigan. Once again, the trial court dismissed the suit, holding that under Michigan choice-of-law rules, Florida substantive law applied and that the Florida statute of repose barred the action.

The Sixth Circuit—giving no deference whatsoever to the district court's determination of Michigan conflicts law—reversed and held that the substantive law of Michigan, rather than Florida, applied. The court of appeals declined to certify the state-law issues to the Michigan and Florida Supreme Courts.

Ford's certiorari petition in *Mahne* will present the following question: "Whether the court of appeals • • • departed from settled principles governing federal-court determinations of state law by (1) not following decisions of the state supreme court and intermediate appellate courts, thereby encouraging forum shopping by federal diversity plaintiffs, (2) not deferring to the district court's interpretation of the law of the state in which it sits, and (3) not certifying the controlling state-law issues to the state supreme court." *Mahne* thus will present the same issue that is before the Court in this case: whether a court of appeals should defer to a district court's reasonable determination of state law in a diversity case.

Ford seeks leave to file this brief to demonstrate how this case relates to the Sixth Circuit's *Mahne* decision and to emphasize that the longstanding practice of deferring to district court determinations of state law leads to more accurate prediction of state law, promotes judicial economy, and best serves the interests underlying *Erie*.

Respectfully submitted.

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QUESTION PRESENTED

Whether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship.

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MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1629

SALVE REGINA COLLEGE,
PETITIONER

v.

SHARON L. RUSSELL,
RESPONDENT

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF FOR THE FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Ford Motor Company ("Ford") submits this brief as *amicus curiae* in support of respondent.

INTEREST OF THE AMICUS CURIAE

As stated in the foregoing motion for leave to file this brief, Ford's interest in this case arises from the fact that it intends to file a petition for a writ of certiorari to review the judgment of the court of appeals in *Ford Motor Co.* v. *Mahne*, 900 F.2d 83 (6th Cir. 1990). *Mahne* is a product liability action filed as a diversity suit in the federal district court in Michigan. The district court dismissed the suit, holding that under Michigan choice-of-law

rules, Florida substantive law applied and that the Florida 12-year statute of repose barred the action. The Sixth Circuit—giving no deference whatsoever to the district court's determination of Michigan conflicts law—reversed and held that the substantive law of Michigan, rather than Florida, applied.

Ford's certiorari petition in *Mahne* will present the following question: "Whether the court of appeals * * * departed from settled principles governing federal-court determinations of state law by (1) not following decisions of the state supreme court and intermediate appellate courts, thereby encouraging forum shopping by federal diversity plaintiffs, (2) not deferring to the district court's interpretation of the law of the state in which it sits, and (3) not certifying the controlling state-law issues to the state supreme court." *Mahne* thus will present the same issue that is before the Court in this case: whether a court of appeals should defer to a district court's reasonable determination of state law in a diversity case.

SUMMARY OF ARGUMENT

The issue in this case is whether a court of appeals is required to engage in *de novo* review of determinations of state law made by federal district judges in diversity cases. Nearly all of the circuits say no, holding that considerable deference should be given and that *de novo* review is not required. Although this Court has never before squarely decided the issue, it has repeatedly recognized that state-law determinations by federal district judges sitting in those states are entitled to "great deference" or "special weight." *United States* v. *Hvass*, 482 U.S. 64, 74 n.6 (1987); *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204 (1956); *Gardner* v. *New Jersey*, 329 U.S. 565, 575 (1947).

De novo review should not be required for three reasons. First, a district judge sitting in a particular state is more likely than a circuit judge to be familiar with the law of that state and the operation of the state courts. District judges regularly try diversity cases involving the law of the forum state and most district judges were leading practitioners or judges in the state before being appointed to the federal bench. By contrast, court of appeals judges may come from any of the states in the circuit and cannot be expected to have specialized expertise on the law of each state in the circuit.

Second, deference promotes judicial economy. Federal court determinations of state law can be rejected as incorrect by even the lowest-level state courts. It makes little sense to devote the scarce resources of the federal appellate courts to deciding legal issues *de novo* when those decisions are of such limited precedential value. The same interests of judicial economy that counsel against review of state-law issues by this Court warrant deference to the district courts by the courts of appeals.

Third, the interests underlying the *Erie* doctrine are best served by *not* establishing court of appeals precedent on state-law issues that would bind the district courts in the circuit. Federal district courts should look always to the state courts—and not to the federal courts of appeals—to determine issues of state law. *De novo* review would be contrary to the federalism interests reflected in *Erie*.

ARGUMENT

THIS COURT SHOULD REAFFIRM THE LONG-HELD, MAJORITY VIEW THAT COURTS OF APPEALS SHOULD DEFER TO DISTRICT COURT DETERMINATIONS OF STATE LAW QUESTIONS

The centerpiece of petitioner's argument is that "[t]he right to at least one appeal is firmly rooted in our jurisprudence" (Br. 22) and that such an appeal must include *de novo* review of all legal issues. Of course, petitioner's central premise is incorrect; there is no absolute right to an appeal, even in criminal cases. *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974); *McKane* v. *Durston*, 153 U.S. 684 (1894). Moreover, this Court has never held that when an appeal is granted by statute the appellate court must decide all legal issues *de novo*. To the contrary, it is well accepted that appellate courts review mixed questions of law and fact in a deferential manner. And this Court has recently held that courts of appeals should review certain legal determinations deferentially. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2459-2461 (1990) (the abuse of discretion standard applies to appellate review of legal determinations under Rule 11); *Pierce* v. *Underwood*, 487 U.S. 552, 558-563 (1988) (the legal determination of whether the government's position was "substantially justified" under the Equal Access to Justice Act is reviewed under an abuse of discretion standard).

There are no absolute rules as to what standard of appellate review is required in every case. Instead, the appellate courts properly employ the standard that best serves the ends of justice in a particular context. This Court has repeatedly recognized that " 'as a matter of the sound administration of justice,' deference [is] owed to the 'judicial actor * * * better positioned than another to decide the issue in question.' " *Cooter & Gell*, 110 S. Ct.

at 2459-2460, citing *Pierce* v. *Underwood*, 487 U.S. at 559-560, and *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). In both *Cooter & Gell* and *Pierce* this Court "concluded that [the] district court's rulings on legal issues should be reviewed deferentially." 110 S. Ct. at 2460; 487 U.S. at 560-561. Petitioner's claim that *de novo* appellate review of legal determinations is required in every case is therefore completely untenable. And as we demonstrate below, the remainder of petitioner's claim—essentially that the interests of sound judicial administration and the principles underlying *Erie* require *de novo* review—is equally incorrect.

A. Ever Since *Erie*, The Courts Of Appeals Have Wisely Deferred To District Court Determinations Of State Law

From shortly after this Court decided *Erie R.R. Co.* v. *Tompkins* until 1984, the federal courts of appeals were of the unanimous view that district court determinations of state law in diversity cases were entitled to substantial deference. The Eighth Circuit was the first to apply the rule of deference, doing so only five years after *Erie*. *Magill* v. *Travelers Ins. Co.*, 133 F.2d 709, 713 (8th Cir.), cert. denied, 319 U.S. 773 (1943). See also *Russell* v. *Turner*, 148 F.2d 562, 564 (8th Cir. 1945). Over the next forty years, *all* of the other circuits followed the Eighth Circuit's lead. And even though federal legislation governing appellate review of district court decisions has been amended several times over those years, Congress has never voiced any objection to the deferential approach taken by the courts of appeals.

The courts articulated the degree of deference somewhat differently from circuit to circuit. Some held that district court determinations are entitled to "great weight," "much deference," or "substantial deference." Other courts indi-

cated that such determinations carry "extraordinary force." And some even went so far as to hold that district court determinations of state law cannot be disturbed unless "clearly erroneous."[1]

[1] See, *e.g.*, *Hull* v. *Eaton Corp.*, 825 F.2d 448, 454 n.9 (D.C. Cir. 1987) (district judge's determination of local law "carr[ies] extraordinary force on appeal"); *Garcia* v. *Friesecke*, 597 F.2d 284, 295 (1st Cir.), cert. denied, 444 U.S. 940 (1979) ("[m]uch deference is accorded to a district court's construction of the law of the locality in which it sits"); *Lomartira* v. *American Auto. Ins. Co.*, 371 F.2d 550, 554 (2d Cir. 1967) ("great weight should be given the determination of a district judge sitting in that state"); *Saludes* v. *Ramos*, 744 F.2d 992, 994 (3d Cir. 1984) ("the district judge's prediction of state law is weighty because of his or her familiarity with the particular jurisdiction"); *Caspary* v. *Louisiana Land & Exploration Co.*, 707 F.2d 785, 788 n.5 (4th Cir. 1983) ("[we] are disposed to accord substantial deference to the opinion of a federal district judge because of his familiarity with the state law which must be applied"); *Avery* v. *Maremont Corp.*, 628 F.2d 441, 446 (5th Cir. 1980) ("[a] federal district court judge's determination on the law in his state is, as a rule, entitled to great weight on review"); *Wilson* v. *Beebe*, 770 F.2d 578, 580 (6th Cir. 1985) (en banc) ("it is this court's practice to accept the 'considered view' of a district judge who has reached a 'permissible conclusion' "); *Lamb* v. *Briggs Mfg.*, 700 F.2d 1092, 1094 (7th Cir. 1983) ("the district court's construction of state law * * * is entitled to great weight on appellate review"); *Luke* v. *American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019 n.6 (8th Cir. 1972), aff'd en banc, 476 F.2d 1023, 1025 (8th Cir.), cert. denied, 414 U.S. 856 (1973) ("[w]e give great weight to the view of the state law taken by the district judge experienced in the law of that state"); *Portland Gen. Elec. Co.* v. *Pacific Indem. Co.*, 574 F.2d 469, 471 (9th Cir. 1978) ("[a]n Appellate Court should give great weight to the determinations of state law made by a district judge experienced in the law of that state"); *Mullan* v. *Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986) ("[i]n reviewing the interpretation and application of state law by a resident federal judge sitting in a diversity action, we are governed by the clearly erroneous standard"); *Alabama Elec. Coop.* v. *First Nat'l Bank*, 684 F.2d 789, 792 (11th Cir. 1982) ("the interpretation of state law by a federal district judge sitting in that state is entitled to deference").

In concluding that deference is required, the courts of appeals frequently relied on this Court's acknowledgment of a district judge's expertise on matters of local law in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). "Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is." 350 U.S. at 204. This Court made the same point in *United States* v. *Hohri*, 482 U.S. 64, 74 n.6 (1987):

> [T]hese cases are tried before local federal district judges, who are likely to be familiar with the applicable state law. Indeed, a district judge's determination of a state-law question usually is reviewed with great deference.

See also *Gardner* v. *New Jersey*, 329 U.S. 565, 575 (1947) ("[t]hat construction of New Jersey law made by a federal judge of the New Jersey District Court is entitled to special weight").

None of the courts of appeals has held that district court determinations of state law are *conclusively* presumed to be correct. To the contrary, the courts acknowledge that parties to diversity actions are entitled to meaningful appellate review of state law determinations. But when the state's highest court has not spoken on the issue, and more than one reasonable interpretation of the law of a state is possible, that given by the district court sitting in the state is entitled to considerable deference. In this case, the First Circuit applied the traditional rule, and upheld the district court's reasonable state-law determination "[i]n view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state." Pet. App. 12.

In 1984, by a 6-5 vote, the Ninth Circuit radically departed from the traditional requirement of deference, hold-

ing that *de novo* review of all district court determinations of state law was mandatory. *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc). Although most of the courts of appeals have revisited the deference issue since *McLinn* was decided, before the Sixth Circuit's decision in *Mahne* only the Third Circuit followed *McLinn* and discarded the rule of deference.[2]

As the five dissenting judges in *McLinn* pointed out (739 F.2d at 1403), the Ninth Circuit majority required *de novo* review without analyzing the purpose of the traditional rule of deference or the practical effect of its rejection:

> The result can only serve as a disincentive to our district courts to explore and explain the authorities which bear on an issue of local law. It will tend to deprive the litigants of the benefit of that effort. It will encourage unsuccessful counsel to appeal on the assumption that reversals will become more frequent. Our own work will multiply. Sadly, the majority arrives at this result without an analysis of purpose, and in the face of overwhelming authority from the other circuits. We are not told why this novel view, rather than the standards applied by other circuit courts, is required to reach a just result in this or any other case.

Indeed, close examination reveals that deference to district court determinations promotes more accurate decision-making, conserves judicial resources, and gives full respect to the interests of federalism underlying the *Erie* doctrine.

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[2] *Craig* v. *Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988). In *Mahne*, the Sixth Circuit failed to apply the rule of deference without explanation of its rationale.

B. District Court Judges Are Generally In A Better Position To Determine Issues Of State Law

As this Court, several commentators,[3] and nearly all of the courts of appeals have recognized, district judges are generally in a better position to determine issues of state law than court of appeals judges. This is true for two reasons. First, district judges regularly try diversity cases governed by the law of the forum state. They are thus likely to achieve a substantial working familiarity with state law. "As a practical matter district judges hear a great number of cases involving the law of their home states." *In re McLinn*, 739 F.2d at 1405 (Schroeder, J., dissenting).[4] In fact, diversity cases account for more than 24% of the docket of federal district courts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 9 Table 4, 14 Table 5 (1988). By contrast, less than 15% of the courts of appeals' docket consists of diversity cases, and each circuit has jurisdiction over several states. *Id.* at 145-146 Table 8-1A. A district judge sitting in a particular state thus spends far more time considering issues arising under the law of that state than a circuit judge could be expected to spend.[5]

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[3] See, *e.g.*, 19 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4507 at 106-107 (1982); Woods, *The* Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. 755, 759 (1984); Note, *The Law/Fact Distinction and Unsettled Law in the Federal Courts*, 64 TEXAS L. REV. 157, 186-187 (1985).

[4] See also Note, *The Law/Fact Distinction and Unsettled Law in the Federal Courts*, 64 TEXAS L. REV. at 186-187.

[5] This case illustrates how much more likely a district judge is than a circuit judge to consider a case under the law of the state where he or she sits. It involved Rhode Island law and was de-

(Footnote continued on following page)

Second, district judges nearly always have had extensive experience as judges or practitioners in the state before being appointed to the federal bench. A circuit judge considering a diversity case, by contrast, may come from any of the states in the circuit and may have no first-hand experience with the state law involved in the case. "[D]istrict judges generally have practiced within a state for some years while [court of appeals] judges, more often than not, have no similar relationship to the law of the state in question." *In re McLinn*, 739 F.2d at 1405 (Schroeder, J., dissenting).[6] This Court recognized as much

[5] *continued*
cided by a district judge sitting in Rhode Island. Only 7.6% of the cases on the First Circuit docket comes from Rhode Island. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 150 Table B 3. Extrapolating from these numbers, we can compare the 24% of the typical district court docket that consists of diversity cases, with the 1.1% (7.6% times 15%) of the First Circuit docket that consists of Rhode Island diversity cases. *Id.* at 145-146 Table 8-1A, 150 Table B 3. It is clear that Rhode Island district judges will consider many more Rhode Island diversity cases than First Circuit judges will review.

[6] See also 19 C. Wright, A. Miller & C. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4507 at 106 ("[a]s a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state"); Woods, *The* Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. at 759 ("trial judges who are nurtured in a state's legal system have, more likely than not, a better predictive 'feel' for the processes of the state judicial system than appeals courts who bring the cold objectivity of ignorance to the task"); Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEXAS L. REV. at 186-187; Comment, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors, Etc., Inc. v. Pro Arts, Inc., 1982 DUKE L.J. 704, 711.

in *Bernhardt*, holding that "[s]ince the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is." 350 U.S. at 204. See also *Cooter & Gell*, 110 S. Ct. at 2460 (deference to district court legal determinations under Rule 11 is warranted because "[t]he district court is best acquainted with the local bar's litigation practices"); *United States* v. *Hohri*, 482 U.S. at 74 n.6 ("local federal district judges * * * are likely to be familiar with the applicable state law").[7]

This case supplies a good example. The state-law determination at issue was made by District Judge Ronald R. Lagueux. Judge Lagueux practiced law in Rhode Island for thirteen years and was Associate Justice of the Rhode Island Superior Court for eighteen additional years before becoming a federal district judge. 1 ALMANAC OF THE FEDERAL JUDICIARY 1st Circuit 17 (1990). The court of appeals panel that reviewed the decision consisted of circuit judges from New Hampshire, Puerto Rico and Connecticut. In these circumstances, it was certainly prudent for the court of appeals to defer to Judge Lagueux's expert judgment on the law of Rhode Island.

[7] Similarly, although this Court does not generally grant certiorari to review unsettled state-law issues, when a case is otherwise before it the Court will defer to the interpretation of the lower court that is more likely to be knowledgeable about state law. *Runyon* v. *McCrary*, 427 U.S. 160, 181-182 (1976); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976). Even though this Court could review such issues *de novo*, it recognizes the wisdom of deferring to local expertise.

C. Deference To District Court Determinations Of State Law Promotes Judicial Economy

Deference to district court determinations of state law also promotes judicial economy and conserves the scarce resources of the courts of appeals. This is true for two reasons.[8] First, the appellate court is faced with a far more difficult task when it must review a trial court's legal determinations *de novo* than when its review is limited to deciding whether the determination was reasonable. "It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources." *United States* v. *McConney*, 728 F.2d 1195, 1201 n.7 (9th Cir.), cert. denied, 469 U.S. 824 (1984).[9]

In addition, *de novo* review would inevitably increase the likelihood that a court of appeals would second-guess and reverse a district court and thus would encourage appeals even in cases in which there is little or no basis in state precedent for reaching a different result. As the dissenting judges in *McLinn* put it, "the majority signals

[8] Placing the primary responsibility on the district courts to determine questions of state law would promote the interests of judicial economy in yet a third respect: if the appellate court is uncertain over whether the district court's interpretation of state law is correct, it would have an increased incentive to use certification procedures now available in a majority of states. If the court of appeals could simply reverse the district court on *de novo* review, it would be less likely to certify the question to the state courts. This Court should use the present case to remind appellate courts of the advisability of using certification procedures (rather than *de novo* appellate review) when those courts disagree with district courts on unsettled questions of state law. See *Elkins* v. *Moreno*, 435 U.S. 647, 663 n.16 (1978); *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974).

[9] See also, Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEXAS L. REV. at 187-189.

to litigants that reversals will be easier to obtain, thus encouraging more appeals." 739 F.2d at 1406. And more appeals and more reversals would also mean more remands, retrials and subsequent appeals. In sum, there can be no doubt that *de novo* review would substantially increase the workload of the already-overburdened federal courts.

Of course, concerns over judicial economy sometimes must give way to other considerations; if the long-term benefit of requiring *de novo* review outweighs the cost, it should be required. Even assuming *arguendo* that *de novo* review would improve decisionmaking—which, for the reasons previously explained, it will not—it would not be worth the cost. Federal court determinations of unsettled state law questions are not binding on state courts and can be rejected as incorrect by even the lowest court in the state. Thus, one of the most important reasons for allowing *de novo* appellate review—to establish a body of precedent to guide the lower courts—is totally absent in diversity cases. "[T]he investment of appellate energy" is not justified because it "will [not] produce the normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce* v. *Underwood*, 487 U.S. at 561. See also *Cooter & Gell*, 110 S. Ct. at 2460.

What the American Law Institute pointed out with respect to diversity jurisdiction in general is equally applicable to *de novo* appellate review of state law:

> From the point of view of the federal courts, the task of deciding such cases under state law imposes especially laborious burdens, often greater in fact than involved in resolving issues of federal law on which those courts may speak with their own authority. And although they may occasionally contribute to the development of state law, those heavy labors are essentially wasteful. Lacking the status of authorized

> precedent and avowedly aiming to project state court decisions, they go for the most part only to the adjudication of the particular dispute between the actual parties.

American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-100 (1968). Accordingly, even if the Court were to embrace the dubious assumption that *de novo* review would improve the accuracy of decisionmaking, that marginal improvement in particular cases would not justify the additional burden on the appellate courts.[10]

D. The Rule Of Deference Best Serves The Interests Underlying The *Erie* Doctrine

Prior to this Court's decision in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal courts were deemed to have independent authority to resolve questions of general common law, even if their resolution conflicted with decisions of the highest court of the state. *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). Back then, as Justice Holmes put it in the *Taxicab Case*, "[t]he often repeated proposition of this and the lower Courts [was] that the parties are entitled to an independent judgment on matters of general law." *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

[10] The judicial efficiency concerns that warrant deference in this situation are similar to the concerns that have led this Court as a general matter to decline to review lower court rulings on questions of unsettled state law. Because even a decision by this Court would have no binding effect on state courts, independent review of such questions would constitute a waste of the Court's resources. *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); Sup. Ct. R. 10.

Erie changed all that and made it clear that our system of federalism requires that state common law—as decided by the highest court in the state—be given full effect in the federal courts:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78.

In addition to holding that the rule of *Swift* v. *Tyson* offended the structure of federalism embodied in the Constitution, the Court emphasized that the rule promoted forum shopping. "*Swift* v. *Tyson* * * * made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court." *Id.* at 74-75. To preserve federalism and to prevent forum shopping, the Court held that federal courts in diversity cases must look to the state courts to determine questions of state common law, such as the questions involved in this case.

The interests underlying *Erie* are best served by *not* establishing court of appeals precedent on state law issues that would be binding on other district courts. Federal district courts should look to the state courts—and not to the federal courts of appeals—to determine issues of state law, responding with sensitivity to the latest indications of state policy (whether or not directly controlling,

and whether expressed in holding or in dictum). Under the deferential approach taken by the majority of circuits, courts of appeals do not issue binding rulings that particular district court interpretations of state law are correct or incorrect, but instead merely determine whether those interpretations are reasonable in light of current rulings of the state courts. District courts deciding subsequent cases therefore should look not to what the court of appeals has said, but solely to the latest pronouncements of state law by the state courts.

As a practical matter, if *de novo* review of district court determinations of state law were required, a district court would be bound by the court of appeals' interpretation of state law and would be most unlikely to render a different interpretation unless the state's highest court had in the meantime expressly rejected the court of appeals' decision. *De novo* review would thus "distort the appellate process" and "establish the circuit law in a most peculiar, secondhanded fashion." *Pierce* v. *Underwood*, 487 U.S. at 561. Because the federal district court would inevitably place great reliance on the court of appeals' decision (which would, for the most part, be ignored by state courts), the possibility of forum shopping (*i.e.*, the possibility that a different or more certain result could be anticipated by filing suit in federal court rather than in state court) would increase. The federal courts would no longer be simply predicting state law, they would instead be establishing a separate, competing body of state law that would be looked to in future cases. That is just what *Erie* counsels against.

In *McLinn*, the Ninth Circuit held that "independent" appellate review of state law determinations was appropriate because appellate courts are structurally better suited to resolve legal issues. 739 F.2d at 1398. "[A]ppellate

judges are freer to concentrate on legal questions"; "the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law." *Ibid.* *De novo* should be required, the Ninth Circuit reasoned, because appellate courts are expert at deciding questions of law:

> The policy concerns supporting the de novo standard apply as well to questions of state law as to questions of federal law. The appellate function is the same in each case and the same structural advantages encourage correct legal determinations.

Ibid. Petitioner repeats these arguments in its brief in this Court. Br. 24-26.

If *Erie* stands for anything, however, it is that the judicial function of federal courts—most certainly including the appellate function—is not the same in diversity cases involving state law as it is in cases governed by federal law. The mode of appellate decisionmaking the Ninth Circuit and petitioner advocate sounds very much like that which Justice Holmes condemned in the *Taxicab Case*. They argue once again "that the parties are entitled to an independent judgment on matters of general law" and that there is a "transcendental body of law" that appellate courts, through careful research, policy analysis, deliberation and collaboration, can better discover. 276 U.S. at 533.

But as Justice Holmes and later Justice Brandeis pointed out, there is no transcendental body of law to be discovered, no need to carry out the same research and policy analysis required in federal cases, and no need to conduct the same kind of appellate review as is required in cases under federal law. Instead, federal courts in *Erie* cases are required to do something quite different: to predict what the state's highest court would hold without

regard to their own policy predilections.[11] That is a prediction that can be better made by a judge sitting in and coming from the state in question. And it is an ongoing predictive process, made in the light of accumulating precedent from state courts at all levels, which is endangered when federal courts of appeals prescribe separate bodies of federal precedent binding on federal district courts until rejected by the highest court of the state.[12]

De novo review is thus not only inefficient and uneconomical, but it would also represent a step backward toward *Swift* v. *Tyson* and independent consideration of state-law issues by the federal courts. It should not be required.

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[11] In *McLinn*, the court of appeals seemed particularly concerned that under the deferential standard of review, conflicting district court decisions on the same state-law issue might be entitled to affirmance as reasonable interpretations of state law. 739 F.2d at 1402 n.3. But that is a normal by-product of the predictive process required by *Erie*, particularly where state law is truly unsettled. Federal courts should *not* try to answer once and for all questions of state law. Instead, they should attempt in each and every case to predict what the state's highest court would say. Different results are not necessarily bad. They are part of a fluid process that continues until the state's highest court resolves the issue. They are "live cell[s] in the tree of justice." Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 776 (1941).

[12] As we point out above (n.8), the predictive process required by *Erie* would be far better served by using the certification procedures available under state law than by deciding state-law questions *de novo* on appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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